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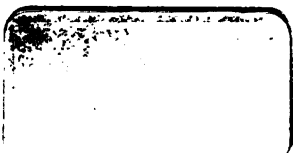
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CASES

DETERMINED IN THE

United States Circuit Courts,

FOR THE

EIGHTH CIRCUIT.

REPORTED BY

JOHN F. DILLON,

THE CIRCUIT JUDGE.

VOLUME III.

DAVENPORT, IOWA:

DAY, EGBERT, & FIDLAR,

1876.

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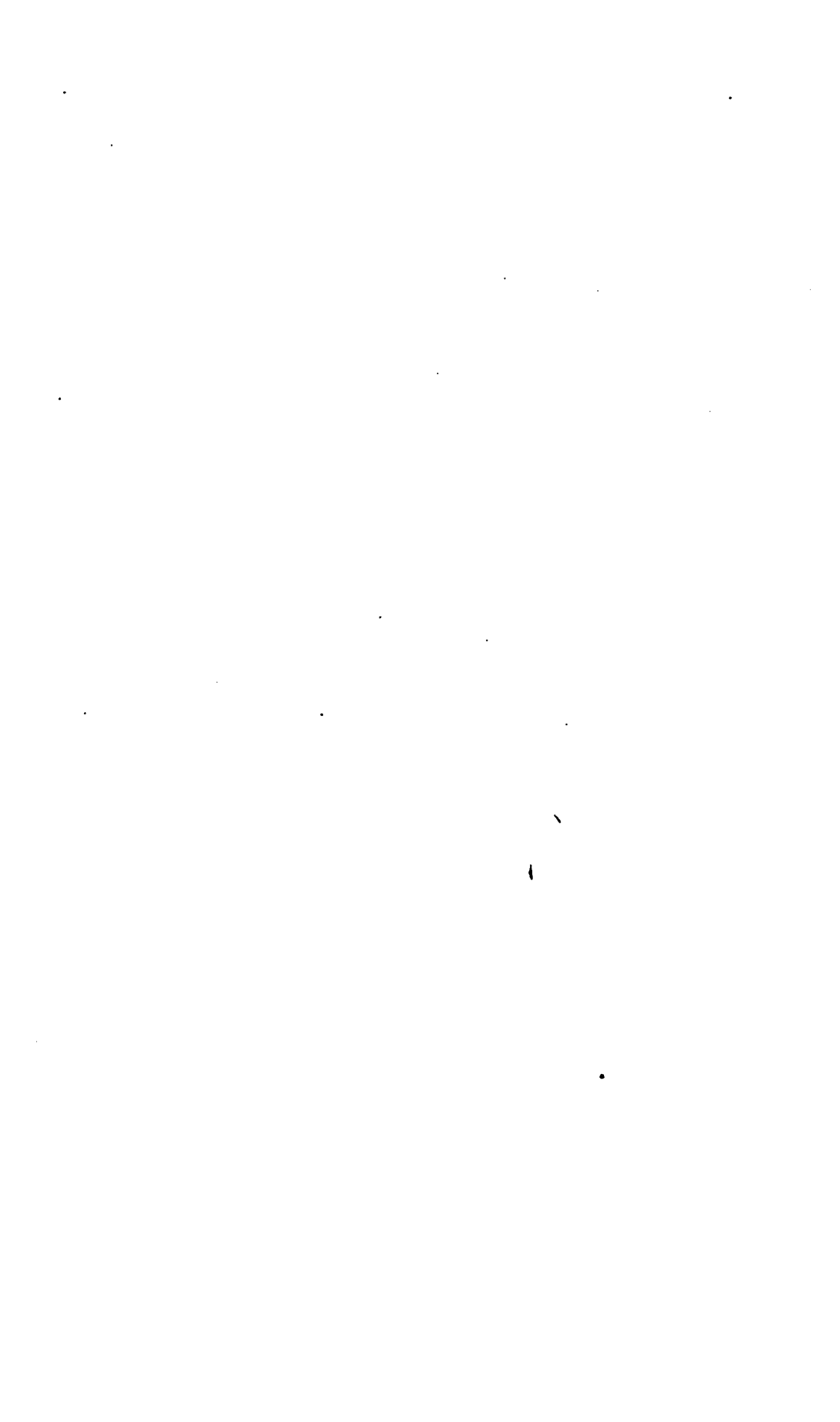
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JUDGES
OF THE
UNITED STATES CIRCUIT COURTS,
FOR THE EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, LL. D.,
Supreme Court Justice assigned to the Circuit.

HON. JOHN F. DILLON, LL. D.,
Circuit Judge for the Circuit.

DISTRICT JUDGES.

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HON. JAMES M. LOVE, Iowa.

HON. SAMUEL TREAT, Eastern District, Missouri.

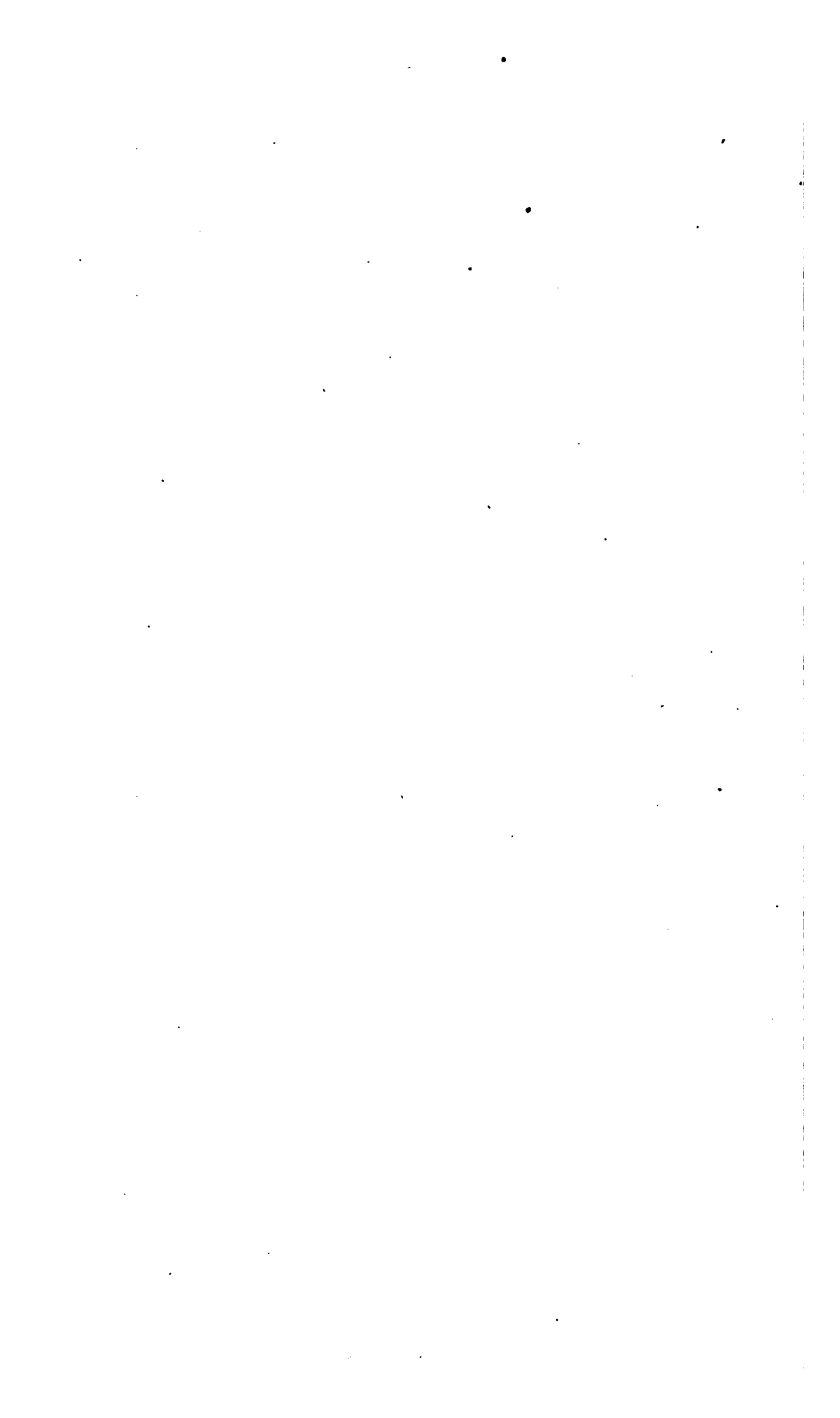
HON. ARNOLD KREKEL, Western District, Missouri.

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HON. C. G. FOSTER, Kansas.

HON. HENRY C. CALDWELL, Eastern District, Arkansas.

HON. ISAAC C. PARKER, Western District, Arkansas.



ACTS OF CONGRESS CONSTRUED.

1789.—Act of September 24, 1789, "Judiciary Act,"	
	Sec. 11, p. 378; sec. 12, 408
1801.—Act of February 27, 1801, "District of Columbia,"	116
1831.—Act of March 2, 1831, "Collector of Port." "Compensation,"	58
1852.—Act of March 22, 1852, "Land Warrants,"	490, 494
1857.—Act of February 26, 1857, "Admission of Minnesota,"	437
1862.—Act of May 20, 1862, "Homestead Act,"	437
1864.—Act of June 8, 1864, "National Banking Act,"	298, 380
1862.—Act of July 1, 1862, "Union Pacific Railroad Company,"	
	303, 313, 319, 335, 343, 366, 367, 515, 524
1864.—Act of July 2, 1864, "Amended Charter Union Pacific Railroad Company,"	303, 313
1865.—Act of February 25, 1865, "Libel in District of Columbia,"	116
1865.—Act of March 3, 1865, "Practice," "Waiving Jury,"	101
1866.—Act of April 5, 1866, "Crimes,"	431
1866.—Act of July 27, 1866, "Removal of Causes,"	350
1867.—Act of February 5, 1867, "Crimes," "Limitations,"	382
1867.—Act of March 2, 1867, "Bankrupt Act,"	3, 37, 74, 83, 101, 110
	113, 136, 214, 228, 230, 239, 287, 291, 295, 370, 420, 444, 457, 474, 477
1867.—Act of March 2, 1867, "Removal of Causes,"	267, 357, 379, 460, 465
1872.—Act of June 1, 1872, "Practice,"	261, 266, 474
1872.—Act of June 8, 1872, "Bankrupt Act,"	295
1873.—Act of February 13, 1873, "Corporations," "Bankrupt Act,"	477
1873.—Act of March 3, 1873, "Bankrupt Act,"	295
1873.—Act of March 3, 1873, "Union Pacific Railroad Company,"	515, 527
1874.—Act of June 20, 1874, "Union Pacific Railroad Company,"	524
1874.—Act of July 22, 1874, "Amended Bankrupt Law,"	
	3, 37, 110, 145, 364, 511, 514—note.
1875.—Act of March 3, 1875, "Removal of Causes,"	284

REVISED STATUTES.

Sec. 13, Rev. Stats. "Repeal,"	533
Sec. 640, Rev. Stats. "Removal of Suits,"	367
Sec. 1014, Rev. Stats. "Arrest," "Bail,"	116
Sec. 3148, Rev. Stats. "Collector,"	284
Sec. 3169, Rev. Stats. "Internal Revenue,"	544
Sec. 3324, Rev. Stats. "Internal Revenue,"	538
Sec. 3453, Rev. Stats. "Internal Revenue,"	285
Sec. 3459, Rev. Stats. "Internal Revenue,"	285
Sec. 4916, Rev. Stats. "Patents,"	131
Sec. 4918, Rev. Stats. "Patents,"	126
Sec. 5045, Rev. Stats. "Bankrupt Act,"	295
Sec. 5440, Rev. Stats. "Conspiracy,"	551, 581, 623



CASES REPORTED.

	PAGE.		PAGE.
Atlantic & Pacific Railroad Co.		Blair v. Allen	101
Bailey v.	13	Boom Company, Patterson v.	465
Atlantic & Pacific Railroad Co.,		Bradley v. Frost	457
Bailey v.	25	Bronson v. Kukuk	490
Adler, United States v.	285	Brooklyn Life Insurance Co.	
Etna Insurance Co. v. Hanni-		Dutcher v.	87
bal & St. Jo. R. R. Co.	1	Brookmire v. Bean	136
Alexander v. Central R. R.	487	Buchanan Co. Harshman v.	175
Aller v. Town of Cameron	198	Buell, <i>In re</i>	116
Allen, Blair v.	101	Butrick, Hicks v.	413
Allison v. Insurance Co.	480	Burlington & Missouri River	
Atlantic & Pacific Railroad Co.		Railroad Co. Hunnewell v.	313
Bailey v.	13	Callaway County, Foster v.	200
Atlantic & Pacific Railroad Co.		Cameron (Town of), Aller v.	198
Bailey v.	22	Cass County, Jordan v.	185
Atlantic & Pacific Railroad Co.		Cass County, Jordan v.	245
Bailey v.	25	Cass County, Kennard v.	147
Atterbury, Marrett v.	444	Cass County, Washburn v.	251
Babcock, United States v.	566	Central Railroad of Iowa, Al-	
Babcock, United States v.	571	exander v.	487
Babcock, United States v.	577	Chandler v. Siddle	477
Babcock, United States v.	581	City of Omaha, Oliver v.	368
Bailey v. Atlantic & Pacific		City of Plattsburg, Judson v.	181
Railroad Co.	13	City of Pleasant Hill, Pollard v.,	195
Bailey v. Atlantic & Pacific		City of St. Paul, Packet Co. v.	454
Railroad Co.	22	Clark, Courtright v.	13
Bailey v. Atlantic & Pacific		Clark, Courtright v.	25
Railroad Co.	25	Coffman, Gray v.	393
Bank of North America, Le-		Cohen, <i>In re</i>	295
moine v.	44	Coler v. Wyandot Co.	391, note.
Bank of Omaha v. Douglas		Conover v. Mass, etc. Insur-	
County	298	ance Co.	217
Bates County, Harshman v.	150	Conver v. Phoenix Insurance	
Bauman v. Union Pacific Rail-		Company	224, note.
road Co.	367	County. (<i>See names of various</i>	
Bean, Brookmire v.	136	<i>counties.</i>)	

	PAGE.		PAGE.
Cragin, Nazro v.	474	Imperial Fire Insurance Co.	
Courtright v. Clark	13	Terry v.	408
Courtright v. Clark	25	Insurance Co. Allison v. . .	480
Dallas County, Huidekoper v.	171	Insurance Co. Conover v. . .	217
Dillon v. Union Pacific Rail-		Insurance Co. Conyer v. 224, note.	
road Co.	319	Insurance Co. Dutcher v. . .	87
Dock Company, <i>In re</i>	83	Insurance Co. Hannibal &	
Dolton v. Nelson	489	St. Jo. Railroad Co.	1
Donovan v. United States . .	53	Insurance Co. McKenty v. . .	448
Douglas County, Bank v. . .	298	Insurance Co. Stilwell v. . .	80
Douglas County, Bank v. . .	380	Insurance Co. Terry v. . . .	408
Dutcher v. Insurance Co. . .	87	Iowa Central Railroad, Alex-	
Durant, Union Pacific Rail-		ander v.	487
road Co. v.	348	<i>In re</i> Buell	116
Englehart, Upton v.	496	<i>In re</i> Cohen	295
Everett, Meador v.	214	<i>In re</i> Handlin	290
Farmer's Loan and Trust Co.		<i>In re</i> Israel	511
v. McQuillan	379	<i>In re</i> King	364
Farmer's Loan and Trust Co.		<i>In re</i> Lowenstein	145
v. Railway Co.	412	<i>In re</i> Obear	37
Farrar v. Walker	506, note.	<i>In re</i> Sectional Dock Co. . .	88
Foster v. Callaway Co. . . .	200	Israel <i>in re</i>	511
Foster v. Lindsay	128	January v. Johnson Co. 392, note.	
Frost, Bradley v.	457	January v. Johnson Co. . . .	402
George, United States v. . . .	431	Johnson Co. January v. 392, note.	
Gray v. Coffman	393	Johnson Co. January v. . . .	402
Hagen v. Kean	124	Johnson Co. Thayer v. 392, note.	
Hall v. Union Pacific Railroad		Jordan v. Cass Co.	185
Company	515	Jordan v. Cass Co.	245
Hamilton v. National Bank . .	230	Judson v. City of Plattsburg	181
Handlin, <i>In re</i>	290	Kansas City Publishing Co.	
Hannibal & St. Jo. Railroad Co.		Saving Bank v.	287
v. Aetna Insurance Co. . . .	1	Kappner v. St. Louis, etc. Rail-	
Harshman v. Bates Co. . . .	150	road Association	228
Haven, Salamander Felting		Kean, Hagen v.	124
Company v.	181	Kellogg v. Hughes	357
Hicks v. Buttrick	413	Kennard v. Cass Co.	147
Home Ins. Co., Stilwell v. . .	80	King, <i>In re</i>	364
Hughes, Kellogg v.	357	Klein, McLean v.	113
Huidekoper v. Buchanan Co.	175	Kuhn v. McMillan	372
Huidekoper v. Dallas Co. . .	171	Kukuk, Bronson v.	490
Hunnewell v. Railroad Co. . .	313	Lafayette Co. Sherrard v. . .	236
		Leahy, White v.	378

CASES REPORTED.

11

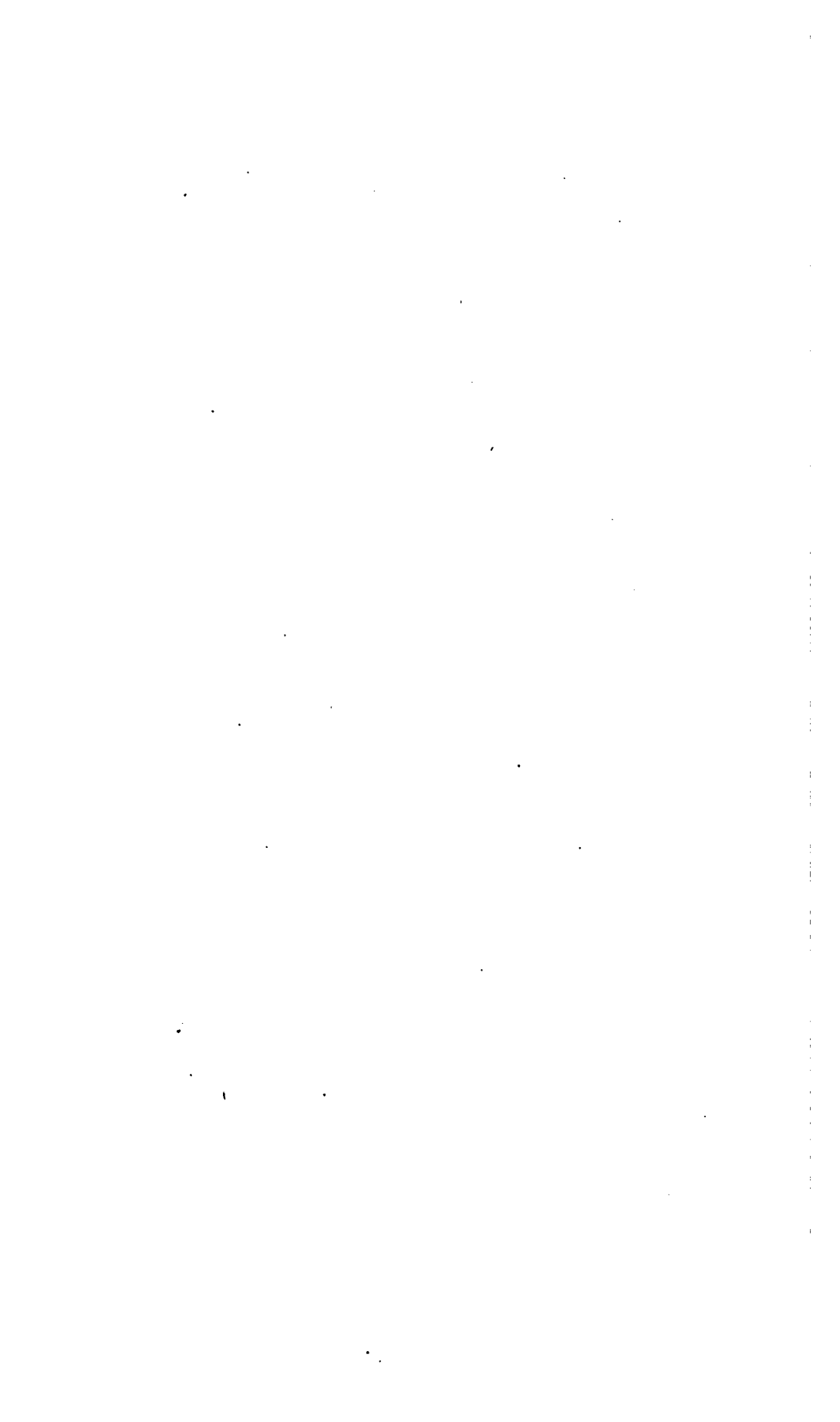
	PAGE.		PAGE.
Lemoine v. Bank of North America	44	Missouri Pacific Railroad Co. St. John v. . . .	25
Leonard, Townsend v. . . .	370	Montgomery Co. Thayer v. . . .	389
Life Ins. Co. Dutcher v. . . .	87	Mungosah v. Steinbrook	418
Lincoln Co. Union Pacific Railroad Co. v. . . .	300	National Bank v. Douglas Co. . . .	330
Lindsay, Foster v. . . .	126	National Bank, Hamilton v. . . .	230
Loan and Trust Co. v. St. Jo. etc., Railroad Co. . . .	412	Nazro v. Cragin	474
Loan and Trust Co. v. McQuillan	379	Nelson, Dolton v. . . .	469
Lowenstein, <i>In re</i>	145	Nicolay v. St. Clair County	163
		Northwestern Packet Co. v. St. Paul	454
Marrett v. Atterbury	444	O'Brian, <i>In re</i>	37
Massachusetts Life Ins. Co. Conover v. . . .	217	O'Brian, United States v. . . .	381
Maxwell, United States v. . . .	275	Oliver v. Omaha	368
McBratney, Usher v. . . .	385	Omaha Bank v. Douglas Co. . . .	298
McDonald, United States v. . . .	543	Omaha, Oliver v. . . .	368
McGinity v. White	350	Opdyke v. Pacific Railroad	55
McKee, United States v. . . .	546	Orner v. Saunders	284
McKee, United States v. . . .	551	Packet Co. v. St. Paul	454
McKee v. Vernon Co. . . .	210	Pacific Railroad, Opdyke v. . . .	55
McKenty v. Insurance Co. . . .	448	Pacific Railroad, Paul v. . . .	13
McLean v. Klein	113	Pacific Railroad, Paul v. . . .	25
McMillan, Kuhn v. . . .	872	Parmelee, Savings Bank v. . . .	403
McQuillan, Trust Co. v. . . .	379	Parmley v. St. Louis, etc. Railroad Co. . . .	18
McShane, Union Pacific Railroad Co. v. . . .	303	Parmley v. St. Louis, etc. Railroad Co. . . .	25
Meador v. Everett	214	Patterson v. Boom Co. . . .	465
Merrick County, Union Pacific Railroad Co. v. . . .	359	Paul v. Pacific R. R. Co. . . .	13
Milwaukee & St. Paul Railroad Co. Minnett v. . . .	460	Paul v. Pacific R. R. Co. . . .	25
Minnett v. Milwaukee & St. Paul Railroad Co. . . .	460	Phoenix Ins. Co. Allison v. . . .	480
Missouri, Kansas & Texas R. R. Company, St. John v. . . .	13	Phoenix Ins. Co. Conner v. . . .	224
Missouri, Kansas & Texas R. R. Company, St. John v. . . .	25	Plattsburg, Judson v. . . .	181
Missouri, Kansas & Texas R. R. Co., Williams v. . . .	268	Pleasant Hill, Pollard v. . . .	195
Missouri Pacific Railroad Co. Paul v. . . .	25	Powell v. Home Ins. Co. . . .	80
Missouri Pacific Railroad Co. St. John v. . . .	13	Publishing Company, Savings Bank v. . . .	287
		Rahilly v. Wilson	420
		Railroad Company, Aetna Insurance Company, v. . . .	1
		Railroad Co. Alexander v. . . .	487
		Railroad Co. Bailey v. . . .	18
		Railroad Co. Bailey v. . . .	22

	PAGE.		PAGE.
Railroad Co. Bailey v. . .	25	St. John v. Railway Co. . .	25
Railroad Co. Bauman v. . .	367	St. Louis & St. Jo. Railroad As-	
Railroad Co. Dillon v. . .	319	sociation, Kappner v. . .	228
Railroad Co. v. Durant . . .	343	St. Louis, Iron Mountain, etc.	
Railroad Co. Hall v. . . .	515	Railroad Co. Parmley v. . .	13
Railroad Co. Hunnewell v. . .	313	St. Louis, Iron Mountain, etc.	
Railroad Co. Kappner v. . .	228	Railroad Co. Parmley v. . .	25
Railroad Company v. Lincoln		St. Paul, Packet Co. v. . .	454
County	300	Sullivan v. U. P. R. R. Co. . .	334
Railroad Co. v. McShane . .	303		
Railroad Co. Merrick v. . .	359	Terry v. Insurance Co. . . .	408
Railroad Co. Minnett v. . .	460	Thayer, Johnson County v. .	
Railroad Co. Opdyke v. . . .	55		392, note.
Railroad Co. Parmley v. . .	13	Thayer v. Montgomery Co. . .	889
Railroad Co. Parmley v. . .	25	Thomas v. Scotland County . .	7
Railroad Co. Paul v.	13	Thomas v. Schuyler County . .	7
Railroad Co. Paul v.	25	Topeka, Savings Association v.	876
Railroad Co. St. John v. . .	13	Town of Cameron, Aller v. . .	198
Railroad Co. St. John v. . .	25	Townsend v. Leonard	370
Railroad Co. Sullivan v. . . .	334	Turton v. U. P. R. R. Co. . .	366
Railroad Co. Trust Co. v. . .	412		
Railroad Co. Williams v. . . .	267	Ulrici, United States v. . . .	532
Ridenbaugh, Young v. . . .	289	Union Pacific Railroad Com-	
Ritchey, Williams v.	406	pany, Bauman v.	367
		Union Pacific Railroad Com-	
Salamander Felting Company		pany, Dillon v.	319
v. Ha en	131	Union Pacific Railroad Com-	
Sanders, Seymour v.	437	pany v. Durant	343
Saunders, Orner v.	284	Union Pacific Railroad Com-	
Savings Association v. Topeka	376	pany, Hall v.	515
Savings Bank v. Parmelee . .	408	Union Pacific Railroad Com-	
Savings Bank v. Publishing		pany v. Lincoln County . .	300
Company	287	Union Pacific Railroad Com-	
Schuyler County, Thomas v. .	7	pany v. McShane	303
Scotland County, Thomas v. .	7	Union Pacific Railroad Com-	
Sectional Dock Co. <i>In re</i> . . .	83	pany v. Merrick County . .	359
Sewing Machine Co. v. Wicks	261	Union Pacific Railroad Com-	
Seymour, Sanders v.	437	pany, Sullivan v.	334
Sherrard v. Lafayette County	236	Union Pacific Railroad Com-	
Siddle, Chandler v.	477	pany, Turton v.	366
Singer v. Sloan, ...	110	Union Pacific Railroad Com-	
St. Clair County, Nicolay v. .	163	pany, United States v. . . .	524
Steinbrook, Mungosah v. . .	418	United States v. Adler	285
St. Jo. & Denver City R. R. Co.		United States v. Babcock . .	566
Trust Co. v.	412	United States v. Babcock . .	571
St. John v. Railway Co. . . .	13	United States v. Babcock . .	577

CASES REPORTED.

13

	PAGE.		PAGE.
United States v. Babcock .	581	Vernon County, McKee v. .	210
United States v. Donovan .	53	Vernon Co. United States v.	281
United States v. George .	431		
United States v. Maxwell .	275	Walker, Farrar v. .	506, note.
United States v. McDonald .	548	Washburn v. Cass County .	251
United States v. McKee .	546	Webster v. Woolbridge .	74
United States v. McKee .	551	White v. Leahy . . .	378
United States v. O'Brien .	381	White, McGinnity v. . .	350
United States v. Ulrici . .	532	Wicks, Sewing Machine Co. v.	261
United States v. U. P. R. R. .	524	Williams v. M. K. & T. Rail-	
United States v. Vernon Co.	281	way Company . . .	267
Universal Life Life Ins. Co.		Williams v. Ritchey . .	406
McKenty v. . . .	448	Wilson, Rahilly v. . .	420
Upton v. Englehart . .	496	Woolbridge, Webster v. .	74
Usher v. McBratney . .	385	Wyandot Co. Coler v. .	391, note.





REPORTS
OF
CASES DETERMINED
IN THE
Circuit Courts of the United States,
FOR THE
EIGHTH JUDICIAL CIRCUIT.

*ÆTNA INSURANCE COMPANY v. HANNIBAL & ST. JOSEPH
RAILROAD COMPANY.*

Where insured property has been destroyed by a wrong-doer and the insurer has paid to the owner on the policy less than the value of his loss, and taken a partial assignment of his right, he cannot sue the wrong-doer in his own name for the injury, either as at common law or under the statute of Missouri. The action must be in the name of the owner of the property destroyed.

(*Before DILLON and TREAT, JJ.*)

Insurance. — Assignment. — Subrogation. — Action. — Parties.

THE plaintiff insured the personal property of one Myron H. Balcom, situate adjoining the defendant's railway, for \$1,900. Within the life-time of the policy, property covered by it to the value of \$2,214 was destroyed by the carelessness of the defendant's servants in the use of its locomotive engine. The insurance company paid Balcom, in full satisfaction for all claim under his policy, \$1,050, and received

Ætna Insurance Co. v. Hannibal & St. Joseph R. R. Co.

from him a written instrument reciting the foregoing facts, and assigning to it all his right to recover on account of said loss against the railroad company, reserving all rights in excess of the \$1,050.

The petition, which is in the name of the insurance company, sets forth the foregoing facts, and asks a judgment against the railroad company for the \$1,050. The defendant demurs, because the cause of action is not assignable, either by operation of law or by act of the parties, and because the plaintiff is not entitled to maintain an action in its own name.

Lucien Eaton, for the plaintiff.

James Carr, for the defendant.

DILLON, *Circuit Judge*.—The property destroyed exceeded in value the amount insured, and the rule of law has been long settled that the insurance company, on the payment of the loss, cannot sue the wrong-doer who occasioned it in its own name. The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gives rise to but one liability. If one insurer may sue, then, if there are a dozen, each may sue, and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since, both in Great Britain and in this country. (*London Assurance Co. v. Sainsbury*, 3 Doug. 245, 1783, in which the Exchequer Chamber unanimously affirmed the judgment of the King's Bench for the defendant; *Rockingham, etc. Ins. Co. v. Bosher*, 39 Maine, 253, and cases cited; *Hart v. Western Railroad Corporation*, 13 Metc. 99, where the subject is fully gone into by Chief Justice SHAW; *Conn. etc. Ins. Co. v. N. Y. etc.*

In re King.

R. R. Co. 25 Conn. 265, 278; *Peoria, etc. Ins. Co. v. Frost*, 37 Ills. 333; Flanders on Insurance, pp. 360, 481, 591.) But it is insisted that the provision of the Missouri statute, that every action shall be prosecuted in the name of the *real party in interest*, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of contract (Gen. Stats. 1865, p. 651, sec. 2), changes the rule. However it might be if the amount paid by the insurer to the assured had equalled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within all the reasons of the rule itself, as expounded by Buller and Mansfield in the case in Douglas above cited, and which is the foundation of the law on this subject. The demurrer to the petition is sustained.

JUDGMENT ACCORDINGLY.

NOTE.—Leave was given the plaintiff to amend and make Balcom plaintiff on the record, but as the latter, as well as the defendant, was a citizen of Missouri, no amendment, so as to give the court jurisdiction, was practicable, and the plaintiff submitted to a non-suit.

As to *subrogation* of insurer to rights of assured against wrong-doer, see cases cited in May on Insurance, sec. 458, *et seq.*

As to suits in name of "real party in interest," see *Weed Sewing Machine Co. v. Wicks*, *post*.

In re KING.

The ninth section of the amendments of 1874 to the bankrupt act, which relates to the discharge of bankrupts, applies to cases *pending* at the time that act took effect, as well as to cases thereafter commenced. (Denying *re Franke*, 6 Chicago Legal News, 414.)

(Before MILLER, Circuit Justice.)

Bankrupt Act.—Discharge of Bankrupt.—Section 9 of the Act of June 22, 1874, Construed.

In re King.

THE bankrupts applied to the district court for a certificate of final discharge, upon the following facts: On August 19th, 1870, a creditor's petition was filed against said bankrupts as co-partners, on which, August 26th, 1870, an adjudication in bankruptcy was made, upon the ground of suspension of payment of commercial paper, more than fourteen days. An assignee was elected September 23d, 1870. The administration of the estate was concluded February 26th, 1873. The assets of the estate, which amounted to \$575.60, cash, were received and disbursed by the assignee. No dividend was paid on unsecured debts. A secured debt of \$250 was proved and paid. Unsecured debts aggregating \$1,222.39 were proved and allowed.

All the debts proved were contracted subsequent to December 31st, 1868. Upon all, said King was liable as principal debtor. June 30th, 1874, King filed, in the usual form, his petition for final discharge, which was referred to the register for his action in the premises, and thereupon a hearing was ordered and held upon said petition on the 13th day of July, 1874, after due and adequate notice by mail, and publication in the usual form as prescribed by law, to all creditors and others in interest. On that day the oath before final discharge, duly taken by said King, was filed, his last examination was passed, but no consent in writing of his creditors was filed, nor was any opposition made or entered to his application.

The district court, *pro forma*, refused to grant the discharge, and the bankrupt brings the matter before this court for review under the second section of the bankrupt act.

J. F. Maury, for the bankrupt.

No appearance *contra*.

MILLER, *Circuit Justice*, orally delivering the opinion of the court, in substance, said: —

In re King.

It is conceded that the bankrupt should have a discharge unless the fact that his assets did not equal fifty per cent of the claims proved against his estate disentitles him to his certificate, and this depends upon the construction to be given to section 9 of the act of 1874. In cases of involuntary bankruptcy commenced since that act took effect, it is clear congress intended that the bankrupt should be discharged without respect to the amount of assets as compared with the amount of debts. But the inquiry here is, does this 9th section apply to cases commenced before the act of 1874 took effect and not then concluded, as well as to cases thereafter commenced? In my judgment it does, and the bankrupt who brings this petition is entitled to his discharge.

I have been shown an opinion of Judge BLATCHFORD, in the matter of *Franke* (6 Ch. Legal News, 414), prepared with his usual care, in which a different conclusion is reached. His reasoning is ingenious, but, as it seems to me, somewhat artificial, and not at all satisfactory to my mind. I think the general rule is that such remedial provisions do apply to pending cases, unless there is something to show that the legislature intended to exclude them, and I can discover no such intention in the 9th section, or any part of the act of 1874; and this conclusion is very much fortified by the express repeal of the provision in the original act requiring fifty per centum of assets, and by the consideration that the 9th section of the act of 1874 covers the whole ground, and provides for both voluntary and involuntary cases. Let it be certified to the district court that the bankrupt is entitled to his final certificate of discharge.

ORDERED ACCORDINGLY.

NOTE.—District Judge LOWELL, in *re Griffiths*, 1 Cent. Law Journal, 507, decided this question in the same way; also, Mr. District Judge HOPKINS, in the case of *Perkins*, 1 Cent. Law Journal, 507. The learned

In re King.

judge, in the case of *Perkins*, from the fact that section 9 of the amendatory bankrupt act of 1874 repeals the provisions of section 33 of the original act, which prohibits the discharge of the bankrupt unless his assets pay fifty per cent of the debts proved against his estate, or unless a majority in number and value of his creditors consent; and from the further fact that this repeal carries with it the repeal of section 1 of the act of July 27, 1868 (15 Stat. 227), and also of section 1 of the act of July 14, 1870 (16 Stat. 276), by which section 33 of the original act was amended; and from the further fact that the remaining provisions of section 9 of the amendatory act of 1874, which provide that in cases of compulsory bankruptcy, the bankrupt shall be entitled to his discharge without reference to the amount of his assets or the consent of his creditors, and that in cases of voluntary bankruptcy, the bankrupt shall not be entitled to his discharge unless his assets shall be equal to thirty per centum of the debts, or unless he shall have the consent of one-fourth in number and one-third in value of his creditors, are *prospective* only, and do not apply to pending cases, was of opinion that bankrupts, both in *voluntary and compulsory cases* commenced before the 22d day of June, 1874, may be discharged, without reference to the question of the amount of assets, or the number of creditors assenting, provided they comply with the law in other respects. (Affirming in part, and denying in part, *re Franke*, 6 Ch. Legal News, 414.) He also held (*in re Perkins, supra*), although the acts of 1868 and 1870 (above stated) may not be repealed, yet as to debts contracted before the 1st day of January, 1869, the bankrupt is entitled to his discharge without reference to the amount of his assets. (Acc. *re Franke*, 6 Ch. Legal News, 414.) And that in fixing the time when the debt was contracted, if notes have been given in renewal of other notes, the debt will be deemed to have been contracted from the date of the original transaction, and not from the date of the renewal notes. He also held that where the debtors opposing the discharge were sureties on the original notes made before the 1st day of January, 1869, as well as upon the renewal notes made since that date, they do not (whichever way the statute be construed) occupy a position to insist on the payment of any portion of the debt of their principal (a voluntary bankrupt) before he can be discharged. He cites in support of the last point, *Mace v. Wells*, 7 Howard (U. S.), 272; *Baker v. Vasse*, 1 Cranch C. C. R. 194; *Craft v. Morse*, 4 Comstock, 604, and *Van Landan v. Corbie*, 8 Taunt. 550, 3 B. & Ald. 13 (1 Cent. Law Journal, 507). See, also, *Singer v. Sloan, post*, opinion in district court, 2 Cent. Law Journal, 141; and also *In re Lowenstein, post*.

Thomas v. County of Scotland.

JOHN T. THOMAS v. COUNTY OF SCOTLAND; and JOHN T.
THOMAS v. COUNTY OF SCHUYLER.

1. Although the decisions of the supreme court of a state expounding the effect of the state constitution and laws upon securities issued by a municipal corporation are not necessarily conclusive upon the federal courts, yet they will be followed, unless cogent reasons appear to the contrary.
2. The decisions of the supreme court of Missouri in *State ex rel. etc. v. Sullivan County*, 51 Mo. 522; *Smith v. Clark County*, 54 Mo. 58, and *State v. Green County*, January term, 1874, 54 Mo. 540, which hold that a provision in the charter of a railway company granted by act of the legislature, authorizing and empowering counties through which the road shall pass to subscribe for its stock and issue its bonds in payment of the same, is a "privilege" of the railway company, which is not taken away by a subsequent constitutional ordinance, are approved and followed.
3. The charter of the Alexandria and Bloomfield Railroad Company gave the county courts of the counties through which the road should pass power to subscribe to its stock and issue their bonds in payment of the same, *without a vote of the people*. Subsequently the company was empowered to change its name and extend its line, and its name was accordingly changed. Subsequently authority was given to this company to consolidate with an Iowa company whose road intersected it on the boundary line between the two states, and the consolidation was accordingly effected, and the consolidated company took a new name. After this consolidation the defendant counties issued their bonds to the consolidated company by name, reciting on the face of the bonds the provision in the charter in the original Alexandria and Bloomfield Railroad Company as their authority to do so, and also reciting on the face of the bonds the subsequent change of name of that company, and the final consolidation and change of name. In a suit upon coupons detached from these bonds, *it is held*, on the authority of *Nugent v. The Supervisors*, 19 Wall. 241, that the authority to issue the bonds was complete, and that the defendants are liable.
4. The case of *Harshman v. Bates County*, United States circuit court, western district of Missouri, November term, 1873, distinguished from the present case.

(Before DILLON and TREAT, JJ.)

Railway Aid Bonds. — Charter Privilege of Receiving Subscriptions. — Effect of Railway Consolidation and Change of Name. — State Decisions how far Binding on the Federal Courts.

Thomas v. County of Scotland.

THESE are suits on coupons attached to bonds issued by the respective counties to pay for subscriptions to stock in a consolidated railroad company, and are in all essential particulars dependent on the same legal questions.

The bond in the Scotland county case reads as follows:—

“ United States of America. \$1,000. Eight per cent Railroad Bond, County of Scotland. Twenty-five years.

“ Know all men by these presents: That the county of Scotland, state of Missouri, acknowledges itself indebted to the Missouri, Iowa, and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the states of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company, formerly Alexandria and Bloomfield Railroad Company, of the state of Missouri, and the Iowa Southern Railway Company, of the state of Iowa, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the said Missouri, Iowa, and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, New York, on the 31st day of December, A. D. 1895, together with interest thereon from the 31st day of December, 1870, at the rate of eight per cent per annum, which interest shall be payable annually, in the city of New York, on the 31st day of December in each year as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the county court of said Scotland county for subscription to the stock of the Missouri, Iowa, and Nebraska Railway Company, as authorized by an act of the general assembly of the state of Missouri, entitled ‘An act to incorporate the Alexandria and Bloomfield Railroad Company,’ approved February 9, 1857.

“ In witness whereof,” etc.

Thomas v. County of Scotland.

The petitions alleged the plaintiffs to be holders for value before due. The defendant counties demurred to the petitions.

Bland & Baker, and *F. T. Hughes*, for the plaintiff.

Sharp & Broadhead, for Scotland county.

B. G. Barrow, *Edward Higbee*, *R. Caywood*, and *E. M. Bradley*, for Schuyler county.

TREAT, J.—Under the decisions of the supreme court of Missouri and of the supreme court of the United States, a *bona fide* holder of such bonds as those here in question, or of coupons annexed, has a right to recover thereon at maturity, unless there was an absence of authority on the part of the county court to issue them; and the county is estopped by the recitals from disputing that all measures antecedent to the issue were properly and lawfully adopted and pursued when the recitals so state.

When these cases were argued at the last term of this court, several grave questions as to the authority of the respective counties to subscribe to the stock of the *consolidated* company, and issue bonds in payment of such subscriptions were fully discussed, leaving the court in serious doubt as to the liability of said counties. Since that term, several decisions have been made by the supreme court of Missouri and the United States supreme court upon the disputed points, and a new argument has been had in the light of those decisions.

What our views might have been on the many propositions arising under the state constitution of Missouri and the state statutes, were they before us *de novo*, is unimportant; for while, in cases like the present, the decisions of the state supreme court would not be conclusive in United States courts, yet they will be, and ought to be, followed, unless

Thomas v. County of Scotland.

very cogent reasons to the contrary appear. The more especially should the United States courts so act, when, under such state decisions, negotiable instruments of the kind sued on have, on the faith thereof, been received in the money markets of the world and passed freely from hand to hand. In the several cases of Iowa municipal and county bonds, the United States supreme court has not only laid down that rule, even disregarding adverse state decisions subsequently made, but has also caused it to be rigorously enforced.

The Alexandria and Bloomfield Railroad Company was chartered in 1857, and in its charter the privilege was given to the county courts of the counties defendant to subscribe to its stock and issue bonds in payment thereof. Subsequently, that railroad company was authorized to change its corporate name and extend its line. The name was duly changed accordingly, as recited in the bonds.

The Missouri supreme court has settled the question that the power given to the county courts by the charter of 1857 for the Alexandria and Bloomfield Railroad Company remained unaffected by the new state constitution; for that power was a "privilege" of the corporation, not impaired or taken from it. Hence, under the several state decisions, especially in the cases against Sullivan, Clark, and Green counties (*State ex rel. etc. v. Sullivan County*, 51 Mo. 522; *Smith & Hall v. Clark County*, 54 Mo. 58; *State v. Green County*, 54 Mo. 540), it must be considered settled that the county courts of Scotland and Schuyler counties respectively had the power to subscribe, without a previous vote of the people, to the stock of the Alexandria and Bloomfield Railroad Company under its changed name of Alexandria and Nebraska City Railroad Company. Indeed, the case against Clark county was under said charter, and is express on that point.

Thomas v. County of Scotland.

This case is clearly distinguishable from *Harshman v. Bales County*, in the United States circuit court for the western district of Missouri. In that case the previous vote of the people was essential to the authority to subscribe, and that vote was for a subscription to a specified company. But in the cases now before this court no such proposition is involved, for the power was granted to these county courts to subscribe and issue bonds of their own motion. These courts could, of their own motion, subscribe to the stock of the Alexandria and Bloomfield Railroad Company, or of the same company under its new name of the Alexandria and Nebraska City Railroad Company, without a previous vote by the people. But the subscription was not made in terms to that company.

Under the act of March 2, 1869, authority was given for the consolidation of that company with any other railroad company in Iowa whose track met at the same point on the boundary line of the respective states. Pursuant thereto the consolidation was had, and the consolidated companies were known as the Missouri, Iowa, and Nebraska Railway Company — the company named in the bonds issued. As reference was fully made to the changed name of the Alexandria and Bloomfield Railroad Company, and to said consolidation, the bondholder was bound, in the light of the law as expounded by the United States supreme court, to look only to the authority of these county courts to make subscriptions to said constituent and consolidated company. The decision in the case against Green county seems to have decided this point; but whether that be so or not, the case of *Nugent v. The Supervisors*, 19 Wall. 241, appears conclusive. The previous cases of *Clearwater v. Meredith*, and of *Marsh v. Fulton County*, were supposed to hold the opposite doctrine. True, in the case of *Nugent* the subscription was made to one of the constituent companies and accepted before consolidation, and the bonds were delivered subse-

Thomas v. County of Scotland.

quently to the consolidated company. But when a subscription is made to a specified company which has at the time power to consolidate with another company, that subscription is made in full view of the fact that the consolidation may occur without invalidating the subscription. In the Bates county case the subscription was not made as the vote of the people required. The stockholders of a constituent company may, by vote, decide whether the consolidation shall be made, and even if a non-assenting stockholder could not be bound by the acts of the majority, he who subscribed to the stock of the consolidated company, after consolidation, could set up no such defense. In *Tomlinson v. Branch*, 15 Wall. 460, and other cases cited, it is clearly established that the new or consolidated company has for its constituent parts all the powers and privileges and exemptions pertaining to the constituents previously. Therefore, if Scotland and Schuyler counties had subscribed to the Alexandria and Nebraska City Railroad Company, and, as stockholders in said company, had voted for the consolidation, they would be in exactly the same position as they are now, viz: stockholders in the consolidated company by their own consent.

It follows, therefore, that if, when the subscription was to a constituent road, and the delivery of bonds to the road consolidated afterwards, the bonds are obligatory, the subscription and delivery of bonds, therefore, to the consolidated road are equally obligatory. The main consideration is the authority to issue said bonds to the consolidated company. That authority does not depend on the fact of previous subscription to a constituent road subsequently consolidated, as authorized by law at the time the subscription was made, which subscription is, by operation of law, carried over to the consolidated road, but on the fact that the court's authority to issue the bonds was complete, as it had the authority to make the counties stockholders in the consolidated road and issue its bonds in payment of its subscriptions.

Parmley v. Railroad Companies.

Such we understand to be the doctrine established by the United States supreme court in the recent case of Nugent; in accordance with which the demurrers in these cases must be overruled.

DILLON, *Circuit Judge*, concurs.

DEMURRER OVERRULED.

NOTE.—These cases have gone to the supreme court of the United States.

Harshman v. Bates County, above referred to, is reported, *post*.

DUNCAN S. PARMLEY v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILROAD COMPANY; AMOS PAUL v. PACIFIC RAILROAD COMPANY; OZIAS BAILEY v. ATLANTIC AND PACIFIC RAILROAD COMPANY; FREDERICK ST. JOHN v. MISSOURI, KANSAS, AND TEXAS RAILWAY COMPANY; MILTON COURTRIGHT v. CLARK, State Auditor, *et al.*

1. The nature and extent of the jurisdiction in equity to restrain the collection of taxes, considered.
2. Facts stated, which, if proved, would authorize a partial restraint of taxes, because of the illegal action of the state board of equalization.

(Before DILLON, *Circuit Judge*, at Chambers.)

Restraining Collection of Taxes.

THESE are separate suits by non-resident stockholders in the several railroad companies above mentioned, brought against the directors of those companies and against the state auditor and the officers of the several counties and municipalities through which the respective roads run, to restrain the collection of taxes levied under the legislation of the state, for the year 187?. The bills, in their frame and theory, are like that which was considered and supported

Parmley v. Railroad Companies.

by the supreme court of the United States, in *Dodge v. Woolsey*, 18 Howard, 351. Special grounds of relief, total or partial, in addition to the general one noticed in the following opinion, are set forth in the bills.

The cases came before the circuit judge, at his chambers, August 5, 1874, upon motions by the respective plaintiffs for the allowance of temporary injunctions. No answers were filed, and the question argued was whether the bills, upon their face, and supposing their allegations to be true, made out a *prima facie* case for a preliminary injunction.

Mr. Dryden, Mr. Baker, Mr. Lytton, Mr. Low, Mr. Drury, and Mr. Waters, for the plaintiffs.

Mr. Ewing, State Attorney General, and *Mr. Clover*, for the defendants.

DILLON, *Circuit Judge*.—Non-resident stockholders in the St. Louis, Iron Mountain, and Southern Railroad Company, in the Pacific Railroad Company, in the Atlantic and Pacific Railroad Company, in the Missouri, Kansas, and Texas Railway Company, and in the Chicago and Southwestern Railway Company, corporations chartered or organized and operating their roads under the laws of the state of Missouri, have filed in the circuit courts for the eastern and western districts of the state, bills in equity for relief against alleged illegal and excessive taxation under the authority of the state, and praying for the allowance of temporary injunctions to stay the collection of the taxes until the merits of the respective complaints can be heard.

Special grounds of relief are set forth in several of the bills not common to all the cases; such, for example, as the alleged erroneous assessments to the Pacific Railroad Company, and to the Missouri, Kansas, and Texas Railway Company, of cars exclusively belonging to the Pullman Company; and to the Chicago and Southwestern Railway Company, of

Parmley v. Railroad Companies.

rolling stock of several hundred thousand dollars in value owned by the Chicago, Rock Island, and Pacific Railroad Company. And again, the Pacific Railroad Company and the Atlantic and Pacific Railroad Company claim exemption, total or partial, from the taxes of 1873, by virtue of an alleged contract to that effect with the state, contained in the twelfth section of the act of December 25, 1852, relating to these lines of road.

There is, however, a common ground of complaint in all the bills in respect to the action of the state board of equalization in fixing the valuation of the property of the respective companies for taxation. It is to this feature of the cases that I will now advert, omitting in this place reference to the grounds of relief peculiar to several of the cases.

In 1873 the legislature of Missouri passed an act specially providing for the assessment of railroad property, and the mode of collection of taxes thereon (Laws, 1873, p. 63). The act was in some respects modified in 1874 (Laws, 1874, p. 130). By this legislation each railroad company in the state is required to make a statement, on oath, of its length of road and all its taxable property within the state, "and the actual cash value thereof." This statement is to be furnished to the state auditor, and a similar statement to the clerk of the county court of each county through which the road runs. The county court of each county is required to examine this statement and determine the correctness of the same as to description of property and valuation thereof. If correct, they so certify it to the state auditor. If property is omitted, they add it. And then, as to all property, they are required to forward to the state auditor "an official statement of what they believe to be the actual cash value." The auditor lays these statements received from the companies and from all the county courts before the state board of equalization, which meets in January of each year.

The state board of equalization is composed of "the mem-

Farmley v. Railroad Companies.

bers of the state senate and the lieutenant governor for the time being," of which "the lieutenant governor is *ex officio* president," a majority of whom shall constitute a quorum, "and each member is required to take an oath as a member of the board" (Laws, 1872, p. 86). As respects railroad property, the board are required, when they meet annually, "to proceed to adjust and equalize the aggregate valuation of the property of each railroad company." It is also provided that "the board shall have the power to summon witnesses, and to compel their attendance; to increase or reduce the aggregate valuation of the property of any railroad company included in the aforesaid statements or returns, and any other property belonging to the said railroad companies which may be otherwise known to them, as they shall see just and right." The board is required to apportion lands and buildings to the counties and towns in which such property is situate, and all the other property is to be apportioned to each county, town, etc., according to the ratio which the number of miles of road therein bears to the whole length of the road. It is upon the value thus determined that taxes are levied, the state taxes to be charged to the companies by the auditor, the county and other local taxes to be levied locally upon the valuation thus settled by the state board of equalization. The state taxes, as well as county taxes, are collected by the county authorities; the municipal taxes by the municipality.

It thus appears that the valuation of railroad property upon which all taxes, state and local, are levied, is determined by the state board of equalization, and all the powers and duties of this board are substantially set forth above.

The bills charge misconduct and illegal action on the part of the board in many particulars. It will suffice to refer to the statement of the more material of them in the case relating to the Iron Mountain Company. The bill sets forth that the board assessed the property of that company "at a

Parmley v. Railroad Companies.

sum more than three fold its cash value," and that in doing so they were not governed by any evidence adduced before them of values, nor by any knowledge they possessed of values, but were in fact moved and influenced by passion and prejudice against the company; that, though they were the same body substantially as fixed the value of the same property for the year 1872 at the total sum of \$2,111,485, yet for 1873 (the year now in question) they raised it three fold, or to the sum of \$6,266,884; that in 1872 they fixed the value of the road bed at \$5,000 per mile, whilst in 1873 they fixed the same at \$14,900 per mile; that the board, consisting of thirty-five members, referred the matter of the values of the company's property to a committee of five, which, it is charged, they could not legally do; that the board, by rule, debarred the company from presenting evidence before the board, but compelled the company to appear before the committee of five to present its evidence to them, or not at all. It is directly charged that the board adopted rules which expressly debarred the company from being heard by the board on appeal from the action of the committee. It is also charged that although the board adopted a rule that the substance of the testimony of each witness should be taken down by the committee, and signed by the deponent, and be reported to the board by the committee, yet it is alleged that in many instances the evidence was not taken down, and "that not a single statement which was reduced to writing was reported to the board, nor was there ever any report to the board of any evidence before the committee, or even of the facts which the committee believed to have been established by the evidence."

It is stated that the committee of the board valued the road-bed at \$7,875 per mile, which the plaintiff alleges was in excess of the actual cash value, "yet the board, without any evidence whatever, and without any knowledge whatever in themselves of values, increased the committee's esti-

Parmley v. Railroad Companies.

mate to the enormous sum of \$14,900 per mile," and this without any report from the committee of the testimony or the facts proved before them, and against the voice of the members of the committee, with one exception.

The bill also charges that the board, in violation of the constitutional provision requiring equal taxation in proportion to value, and intending to discriminate against railroad property, "knowingly and intentionally required such property to pay one-third more taxes in proportion to its value than other property of equal value. It is also charged that the state board exceeded its lawful powers by undertaking to make, and making, *a new and original assessment*, instead of confining themselves to the duty of *equalizing* assessments.

In the case of the Pacific Railroad, it is alleged that the board in like manner increased the aggregate value from \$3,716,920, as returned by the company, to \$9,654,423, and fixed the value of the road per mile at \$26,000.

The board in like manner, it is charged, increased the taxable valuation of the Atlantic and Pacific Company's property from \$2,368,504 to \$6,215,503, and fixed the value of its road per mile at \$10,000; the property of the Missouri, Kansas, and Texas Company was increased by the board from \$1,801,688, as valued by the company, or \$3,481,246, as valued by the county court, to \$5,698,950, and fixed the value of the road per mile at \$18,000; the valuation of the Chicago and Southwestern Railway Company was increased from \$650,000 to \$1,849,339. Other complaints in the bill are made against the board of a minor character, such as the failure of an active member to take the oath of office; and intentionally assessing as the company's, property which did not belong to them.

Such are the grievances complained of; and the question now is whether, if the allegations of the bills are substantially true, they give a right in equity to relief, and to what extent. The cases are now before me, after notice to the

Parnley v. Railroad Companies.

defendants, for an allowance of a temporary injunction. No answers have been filed, and hence the material allegations of the bill, which are sworn to, are, on this hearing, and for the present purpose, to be considered as true, and the inquiry is, supposing the bills to be true, Can a court of equity interfere, either preliminarily, by an injunction, or finally, by a decree?

The decisions as to what will give an equity to enjoin the collection of taxes are conflicting, and, to my mind, not very satisfactory. Since all regular governments subsist by means of taxes, which are assessed, levied, and collected under laws necessarily stringent and summary, in order to insure prompt payment, it is obvious that the courts should not interfere, by injunction, with the regular working of these laws, unless an injury to the citizen will be thereby inflicted, for which he has no other adequate remedy. When this is the case, however, the courts should not hesitate to interfere to protect the citizen against the action of the state; for the state, acting for all, is under the highest obligation to deal justly with each.

I confess to some doubts as to what will warrant the judicial tribunals in interfering with the results of the action of such a body as the state board of equalization. It is clear that such interference cannot be justified for reasons merely formal or technical, or for acts which do no substantial injury, or where the wrong could have been avoided or prevented by measures or steps open to the party at the time. Mistakes of judgment on the part of such a body in honestly over-valuing property cannot ordinarily, if ever, be corrected by a bill in equity.

On the other hand, I am unwilling, without further reflection, to say that in no possible case will a court of equity interfere with the result of the action of an assessing or equalizing body. Suppose local assessors purposely value the property of non-residents two or three times as high as

Parmley v. Railroad Companies.

the property of residents, and that this action is confirmed by the local board of equalization, which refuses to interfere because in sympathy with the feelings which actuated the assessors, is there no remedy? Now, if the charges in the present bill be true, the state board, actuated by passion and prejudice, and with a design to discriminate against railroads, and without evidence, have assessed the property not only higher than it was valued by the companies, on oath, but higher than it was valued by the county courts, and much higher than it was valued upon evidence by committees of their own body, the result of which is, as alleged, an excessive valuation of at least one-third more than other property of equal value, thereby compelling the railroads to bear more than their share of the public burdens. If all this can be established, my impression is that equity ought to intervene—not, however, to annul the whole assessment, but only to reduce the inequality. So if the board should *clearly exceed its lawful jurisdiction*, there might be a remedy by injunction in a proper case. In stating that such are my impressions, I wish to add that they are not firm convictions, and that on questions of so much difficulty and importance, it is but just to both sides that any final views should be reserved until they can be brought upon full argument before the whole court. It is a fortunate circumstance that the court meets next month, and that these cases can be heard before all the judges, and perhaps a decision then had, or, at all events, the principles of decision settled, so as to involve no great delay in the collection of these taxes to the extent of the actual value of the property, except those roads, if there be any, which have a still subsisting legislative contract of exemption from taxation.

In order to bring this matter before a full court, and to give the defendants an opportunity to answer the charges in the bills, if they so desire, I have thought it best to allow temporary injunctions to issue, unless the defendants are

Parmley v. Railroad Companies.

willing to let the collection of the taxes rest until the views of the court can be had. We will give every facility for bringing the question to a speedy hearing, and the counties, etc., can at any time, if this is deemed desirable by them, have the injunctions modified so as to allow them to collect taxes so far as the admitted value of the property shows a liability, or so far as we see it to be equitable; or we can refuse to continue the injunction, except on condition that such a portion of the taxes be paid into court for the use of the state, counties, and towns entitled thereto. At present, and until the views of the court are settled concerning the right to maintain these bills, it is, perhaps, best not to complicate the cases by requiring payment of a proportion of the assessed taxes as a condition of the injunction. Inasmuch as there exist doubts as to the right to maintain these bills, and in view of the fact that the time is only a few weeks distant, it would seem best on all sides to let the matter rest until the court meets, without requiring injunctions to be formally issued, which will be attended with costs; but if the defendants are unwilling to allow this to be done, a temporary injunction may issue in each case, reserving the right of the defendants to move at the next term to dissolve it, with or without answer, as they may be advised. If answers are to be filed to resist the injunctions, let this be done by the September rules, and any affidavits in support thereof by September 15th, and counter-affidavits by September 25th. Motions to dissolve or modify the injunctions may be set down for the second Tuesday of the term.

ORDERED ACCORDINGLY.

NOTE.—For the disposition of this case at term, see *S. C. post*.

As to enjoining taxes, see *First Nat. Bank v. County of Douglas, post*; *Union Pacific Railroad Co. v. McShane, post*; *Hunnewell v. B. & M. Railroad Co. post*; *Oliver v. Omaha, post*.

Bailey v. Atlantic & Pacific R. R. Co.

BAILEY v. ATLANTIC AND PACIFIC RAILROAD COMPANY, et al.

1. Under the circumstances, a temporary injunction against the collection of taxes by and under state authority, was granted.
2. Whether the exemption from taxation granted to the Southwest Branch of the Pacific Railroad by section 13 of the act of December 25, 1852, continues in favor of the Atlantic and Pacific Railroad Company, *quære*. (See *Parmley v. Railroad Co. post.*)

(Before DILLON, Circuit Judge, at Chambers.)

Restraining Collection of Taxes.

THIS is a bill by certain stockholders of the Atlantic and Pacific Railroad Company against that company, its directors, and the officers of the counties through which the road runs, to restrain the collection of taxes levied by state authority on the property of the company for the year 1873. The bill, in theory, is like that in *Dodge v. Woolsey*, 18 Howard, 331.

One ground on which an injunction is asked is that the property of the company is, by legislative contract, exempt from taxation for the year 1873.

Baker & Lytton, for plaintiff.

H. Clay Ewing, Attorney General, and *Mr. Clover*, for the counties.

DILLON, *Circuit Judge*.—The special ground of relief in this case rests upon the twelfth section of the act of the legislature of the state, approved December 25, 1852, by which the Pacific Railroad, and the Southwest Branch Railroad, were, for a certain period, exempt from taxation, and upon the question whether the present company, the Atlantic and Pacific Railroad Company, is entitled to the benefit of that exemption, as the successor of the Southwest Branch Railroad. The twelfth section, above mentioned, provides that

Bailey v. Atlantic & Pacific R. R. Co.

"the said Southwest Branch Railroad shall be exempt from taxation until the same shall be completed and in operation, and shall declare a dividend. * * * Provided, that if said company shall fail, for a period of two years after said road shall be completed and put in operation, to declare a dividend, then said company shall be no longer exempt from payment of said tax."

The undenied allegation of the bill is that the company has never declared a dividend, and that the road was not completed until the month of May, 1871.

The exemption, if it exists, in favor of the Atlantic and Pacific Company, would continue until May, 1873. The taxes now in question are taxes for 1873, and the learned counsel for the state have conceded in argument that, under the decision of the supreme court of the United States in the *Pacific Railroad Co. v. Maguire*, 18 Wall. 391, holding that this twelfth section did constitute an irrevocable legislative contract for the temporary exemption from taxation therein provided for, that the property of the Atlantic and Pacific Railroad was not taxable for 1873, provided that company is entitled to the benefit of provisions of the aforementioned twelfth section of the act of December 25, 1852. But the counsel for the state denies that the original exemption remains in force, or that it was granted, or after July 1, 1865, could be granted to the present company, or to the South Pacific Company, its vendor or predecessor, and claims that in this respect the case is like that of *Trask v. Maguire*, 18 Wall. 391 (the Iron Mountain case), in which this court held, and whose holding was affirmed by the supreme court, that the original exemption in that case did not survive or continue in favor of the present company.

Judge TRENT has written an opinion in which he distinguishes the two cases, and seems to think that the Atlantic and Pacific Railroad Company is entitled to the legislative exemption from taxation granted by section 12, before men-

Bailey v. Atlantic & Pacific R. R. Co.

tioned. (*Atlantic and Pacific Railroad Co. v. Cleino*, 2 Dillon, C. C. R. 175.) As the report of that case shows, I formed and expressed no opinion on this point, and placed my judgment distinctly upon another ground.

On the present argument, three recent opinions of the supreme court were produced — *Ex parte South Pacific Railroad Company*; *In re Laclede County Taxes for 1871*; *Atlantic and Pacific Railroad Company v. Lawrence County*, and *Same Company v. Barry County* — in which that court, in favor of the company above named, set aside the taxes levied by the counties, on the ground that the company was entitled to the legislative exemption in said section 12. The opinions were brief, but this is the very point involved, and, although it is not discussed, it is, perhaps, fair to presume that it was not overlooked.

I have purposely refrained from examining, at this time, the question whether, in view of the provision of the constitution of 1865 (art. 11, sec. 16), by which the state was prohibited from thereafter exempting private property from taxation, this case can be distinguished from the Iron Mountain case, because I think the question ought to be brought before a full bench and decided upon a more careful consideration than I am at present able to give to it. In view, however, of the judicial decisions mentioned, particularly those of the state supreme courts in favor of the company on the very point here involved, it would seem the wiser course to grant a temporary injunction against the collection of the tax. This is done, however, with the reservation of a right to the defendants to move to dissolve it on the first day of the next term, or as soon thereafter as counsel can be heard. It is ordered accordingly.

ORDERED ACCORDINGLY.

NOTE.—The exemption claimed by the company was held at the term not to exist. See Mr. Circuit Justice MILLER's opinion, *post*.

Paul v. Missouri Pacific Railroad Company.

PAUL v. MISSOURI PACIFIC RAILROAD COMPANY.

There is no legislative exemption of the defendant from taxation by the state under section 12 of the act of the Missouri legislature, approved December 25, 1852.

(Before DILLON, Circuit Judge, at Chambers.)

Taxation of Railways. — Injunction.

DILLON, Circuit Judge.—In this case it is claimed, in behalf of the railroad company, that there is a perpetual legislative exemption in its favor from all taxes except *state taxes proper*. This claim is based upon a portion of the twelfth section of the act of December 25, 1852, not adverted to in the foregoing case of the Atlantic and Pacific Company. My impressions on the argument were against the exemption as claimed to exist by the company; but as I have allowed a temporary writ on the ground common to all cases, I will not consider this particular ground at this time, and reserve the formation of a definite opinion until the question is brought before the full bench.

NOTE.—The exemption claimed by the company in this case was denied at the term. See opinion of MILLER, Circuit Justice, in the next case.

DUNCAN S. PARMLEY v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILROAD COMPANY; AMOS PAUL v. PACIFIC RAILROAD COMPANY; OZIAS BAILEY v. ATLANTIC AND PACIFIC RAILROAD COMPANY; FREDERICK ST. JOHN v. MISSOURI, KANSAS, AND TEXAS RAILWAY COMPANY; MILTON COURTRIGHT v. CLARK, State Auditor, *et al.*

1. The nature and extent of the jurisdiction of a court of chancery to enjoin the collection of taxes, considered by MILLER, Circuit Justice.

Parmley v. Railroad Companies.

2. A distinction, on principle and policy, suggested between enjoining local or municipal taxes, and taxes levied by the state for purposes of general revenue.
3. A court of the United States will proceed with great caution in restraining the collection of the ordinary revenues of a state.
4. The court laid down the following principles as those which would hereafter govern it in respect to restraining the collection of taxes, viz: that whenever a party comes into this court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part which he admits to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that he has paid it, or tendered it; and it is not a sufficient allegation to come and say that he is willing, or even that he has paid it into the court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, or ought to be paid, by setting up a contest over that which is doubtful, and which may, or may not, be necessary to be paid.
5. The specific exemption from taxation claimed by the Missouri Pacific Railroad and by the Atlantic and Pacific Railroad, under section 12 of the act of December 25, 1852, is not well founded.

(Before MILLER, DILLON, and TREAT, JJ.)

Jurisdiction of Equity to Restrain Collection of Taxes. — Terms of Interference.

THESE are the cases above reported, and at the September term, 1874, they came before the court (MILLER and DILLON, JJ., and by their request TREAT, J., sat at the argument).

The bills, as amended, in the several cases, in substance, set forth and allege that an illegal and excessive assessment of state, county, and municipal taxes has been made for the year 1873, in consequence of an excessive and exorbitant valuation of the property of all the railroad companies, alleged to have been illegally and improperly made by the state board of equalization, without jurisdiction.

The bills specifically charge that the members of the board were actuated by passion and prejudice, and that "in

Parmley v. Railroad Companies.

violation of the constitutional provisions requiring equal taxation in proportion to value, and intending to discriminate against railroad property," "knowingly and intentionally required such property to pay one-third more taxes in proportion to its value than other property of equal value." In the assessment of the St. Louis, Iron Mountain, and Southern Railroad, it is charged that, without evidence, the board fixed the value of the road at \$6,268,334, and this sum, it is alleged, is more than three times the actual cost value of the road. That in 1872 the board fixed the value of the property at \$2,111,435.

It is also alleged that the state board of equalization referred to a committee of five members the taking of all evidence, as to the value of the property of the road, and that the attorneys and representatives of the road were only permitted to appear and be heard before this committee, and not before the whole board, and that the evidence, when so taken by the committee, was ordered by the board to be reduced to writing and reported to the board. Yet in many instances the evidence was not taken down, and it is alleged "that not a single statement, which was reduced to writing was reported to the board, nor was there ever any report to the board of any evidence before the committee, or even of the facts which the committee believed to have been established by the evidence."

Similar allegations as to excessive valuation and alleged irregularities are made in each of the bills, as also the allegation that two of the members of the board were not sworn; that the lieutenant governor, although by law a member of the board, was not permitted to vote. And, in addition to these common grounds of complaint as to the action of the state board of equalization in fixing the value of the railroad property, there are special grounds of relief set forth in several of the bills not common to all. These special grounds are:

Parmley v. Railroad Companies.

contrary, it is averred that the actual value of the road is largely in excess of this sum.

1. As to the special exemption from taxation claimed by the *Atlantic and Pacific Railroad*, it is in the answer denied that the Atlantic and Pacific Railroad is exempted from taxation under the provisions of the 12th section of the act of December 25, 1852, and it is alleged that in 1866 all the rights, property, and franchises of the Southwest branch of the Pacific Railroad became and were forfeited to the state of Missouri, and the property and franchises granted by the act of December 25, 1852, and other acts amendatory thereof, which took possession of and run the same for some time, when the state, as sole owner, sold the same to one John C. Fremont, on certain terms and conditions, which said Fremont on his part failed to keep and perform, and the said road, its property and franchises, again reverted to and vested in the state of Missouri, and that all the title that was ever vested in the South Pacific Railroad Company (from whom the Atlantic and Pacific Railroad claim title) in and to said property, was by virtue of an act of the legislature, approved March 17th, 1868. It is further shown that on the 8th of April, 1865, a new constitution of the state of Missouri was adopted, and the exemption of property from taxation by the legislature prohibited. It is therefore averred that the legislature, at the time of passing the act under the provisions of which the road claims title, had no power to exempt the property from further taxation, neither by the terms of that act did they assume or attempt so to do; and by the provisions of the act of March 15th, 1871, entitled "An act to authorize the South Pacific Railroad Company to merge in and consolidate with the Atlantic and Pacific Railroad Company," it was provided that such consolidated company should "be subject to all the duties, liabilities, obligations and provisions of the general laws of the state governing railroad companies."

Parmley v. Railroad Companies.

2. The special claim of exemption made by the *Missouri Pacific Railroad* from county, municipal and other local taxation, under the provisions of the 12th section of the act of December 25, 1852, is denied. And it is claimed that the construction now contended for on behalf of the road, of the section referred to, is erroneous.

3. The errors of assessment of the Pullman palace cars is denied, and the liability of the railroad company for the taxes thereof is claimed to be perfect, and that the company is bound to pay taxes thereon.

4. And as to the pretended demand of the stockholders, and refusal of the companies to institute proceedings in the proper courts to prevent the collection of said taxes, "respondents deny that the complainants, or any one for them, demanded of said railroad company, its board of directors and the defendants composing said board, or any of them, that they should institute proceedings in the courts to prevent the collection of said taxes, and to have the assessment of levy and said taxes set aside and annulled, and respondents allege that any such pretended demand and refusal, if made, was not in good faith, but was a mere subterfuge for the purpose of giving to the United States courts jurisdiction in the premises."

Motions were made in behalf of the state and the various counties and cities to dissolve the temporary injunctions which had been allowed by the circuit judge, as appears in the report of the preceding cases. The following opinion of MILLER, circuit justice, was delivered orally and reported in phonography.

H. Clay Ewing, attorney general of Missouri, *Frank J. Bowman* and *Britton A. Hill*, for the motions.

Mr. Baker, *Mr. Low*, *Mr. Shankland*, *Mr. Clover*, *Mr. Dryden*, *contra*.

Parmley v. Railroad Companies.

MILLER, *Circuit Justice*.— I will proceed to state what conclusions the court has come to in regard to the suits to enjoin the state and counties from collecting taxes of railroads, which have been argued before us for the last three days.

The counsel engaged in the cases will see that it has been almost impossible for us to give any full consideration to the arguments which have been presented, and which were the result of a great deal of labor and research, and upon one branch of the subject—at least upon one of the most interesting questions that can come before the court—I mean the extent to which a court of equity can interfere by injunction to restrain the collection of taxes. The authorities are by no means uniform, are not very specific, and seem to be in a state of fluctuation, and for any satisfactory judgment, and I might also say any intelligent judgment, they need a more thorough examination than our opportunities, or at least my time, in this court will permit; and my brother DILLON desires that, as far as we can dispose of the cases, it shall be done before I leave the court, as he adjourned the cases practically to this court, with the view of getting the benefit of the full bench.

The main question in these cases, the difficult one, or the one which has been argued most at length, is, as I said before, the extent and nature of the jurisdiction of a court of chancery to enjoin the collection of taxes.

Now, apart from any authorities on the subject, looking at it as a question open to all the general considerations which should govern it, it might seem that those principles should be different as they are applied to different classes of taxes. It certainly cannot be denied that these various forms of municipal taxation by communities and cities and townships are exercised by a class of men who are not very familiar with the laws under which they proceed; and, to say the least of it, are not always observant of the rights of all parties interested in taxation, and who do not always use

Parnley v. Railroad Companies.

the proceeds of that taxation, either in the wisest manner, or in the manner in which the law peremptorily declares they shall be used ; and so for these reasons it would seem, looking at the general nature of the subject, that it ought to be within the power of some judicial body to arrest any unlawful proceeding of theirs in the levying and collection of taxes, and that no great harm would come in dealing with such bodies as they are, in subjecting them occasionally to the wholesome restraint of judicial proceedings, when they are levying their taxes upon the people and disbursing them in ways which are not warranted by law.

But looking at the question of a State levying her taxes and collecting her revenue, a State which, according to the old form of expression, has been called a sovereign—a body which, if you refer to it as a corporate body or as an organized system of civil government, is wholly dependent upon taxation for its existence—daily existence—and which, unless the taxation is paid, must fall to pieces and dissolve civil society, why, one must pause and hesitate whether an ordinary court shall interpose and say, None of these taxes shall be paid ; and yet I do not find in any of the authorities which have been read here, that any such distinction has been made. The right of the court to interpose has been based upon the same principle so far as judicial authority cited here is concerned. But it is impossible that sitting here as a court of the United States, in some sense, not exactly a court of the state, certainly not a court created by authority of the state—a jurisdiction that in former times, exercising its power upon state rights, has always been looked upon with jealousy, it seems proper that, as judges of this court, we should proceed with very great caution and hesitation, when attempting to lay our hands on the authorities the state has provided for the collection of its revenue. I confess I have always had a very strong opinion that the circumstances under which a court of equity ought to interfere

Parmley v. Railroad Companies.

to restrain the collection of any taxes are very limited, but the cases cited on the argument show that the courts have gone further than I had supposed.

It is certainly true that a great many of the best courts in the Union have held the right to interfere in various classes of cases in regard to protecting the citizen against unlawful taxation. Now that is about as far as I can go on that subject. We want, before making up our minds decisively on any of these subjects, to look at the authorities and examine them very carefully, and when it is decided at all to decide it in a manner which we will be content to abide by, until directed by superior authority to do otherwise.

The result of this consideration is, we are not disposed to decide that branch of the case. But we are all united on another proposition which is essentially connected with this case, and which enables us, if not to make a final decree, to make a very important order at this term of court, and that is that we adopt this rule: That whenever a party comes into this court to ask the court to enjoin the collection of a tax or a part of a tax, if there is any part he admits to be due, or which the court can see upon the statement in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that they have paid, or that they have tendered it; and it is not a sufficient allegation that they are willing to pay or that they will pay it into court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his tax, or any portion of it, cannot screen himself during a course of long litigation from paying that which must be paid, and everybody can see must be paid, by setting up a contest over that which is doubtful, and which may or may not eventually, be necessary to be paid.

The result of these observations is, that so far as these cases are concerned, in all of them we shall enter an order

Parmley v. Railroad Companies.

assuming that the reports of amounts for the roads to be assessed, made by the various county courts shall be assumed for the present, at least, as the lowest assessment which can be made, and we will make an order giving reasonable time to these plaintiffs or petitioners to go and pay the state and counties the tax assessed on that valuation, and the injunction will remain until that time has elapsed. But if the various railroads shall come up within that time, or at the end of it, and show to the court that they have paid that proportion of their taxes, this injunction will stand for the remainder until final hearing; and if at the end of that time no such evidence is brought to this court as to any railroad, the whole injunction will be dissolved, and it can seek such other remedy as it chooses. The bill remains, but the injunction will be dissolved, if it is found it does not pay as required.

2. *As to the Missouri Pacific Company.* There is another branch of the subject upon which I ought, perhaps, to say something, but I do not feel inclined to say much. The first is the specific claim set up by the Missouri Pacific Railroad to a total exemption from all county taxation; and, second, to exemption from the present tax, because they claim that the 12th section of the act of December 25, 1852, is a contract as to the *mode* of levying taxes, which has been violated by the manner in which the taxation is levied on it. In regard, first, to the exemption from county taxation. I have no question at all that there is such exemption, and that the statute meant to say there is an exemption of this Missouri Railroad from all taxation until the road is completed and a dividend declared, or until two years after the road is completed. This, I think, is the intention of that section. Then all powers of rightful taxation revert to the legislature, and after that time has arrived the property becomes liable to county taxation as well as all other taxes. As to the other branch of the subject, I have a little more doubt. But my

Parmley v. Railroad Companies.

opinion is, and in that my brother DILLON concurs, that the provision that the tax shall be assessed by the auditor, upon the report of the president of the board, is merely a provisional mode for the first taxation, because there was no mode existing at that time by which railroad property could be taxed, or was taxed. It was simply a provisional mode to be carried out and executed until that period should come, and it leaves the whole subject of taxation of railroads to the same general principles that govern all taxation. [This view was subsequently sustained by the supreme court, *Bailey v. Pacific Railroad Company*, Oct. 1, 1874, 22 Wall.]

That disposes of the special claim of the Missouri Pacific Railroad.

3. *As to the Atlantic and Pacific Company.* The Atlantic and Pacific Company maintain in the first place that they have all the rights and privileges of exemption from taxation which the said 12th section of the act of 1852 conferred on the Missouri Pacific, of which it was part at the time, and that they had not completed their road within the time which allows the tax to be levied at all. On that part of the subject I have only to say that the case of the Iron Mountain Railroad (*Trask v. Maguire*, 18 Wall, 391), decided by the supreme court of the United States at the last term, settles that question against the Atlantic and Pacific Railway. It settles this, that when the state of Missouri, after all those various sales, resumed the franchise and property of the railroad it held them subject to the constitutional provision which forbids any future exemption from taxation. That disposes of this case as far as the courts have gone into the subject, and as far as we propose to go at this time.

NOTE.—Subsequently, upon agreement of counsel as to amount to be paid under the foregoing views, the court made on order applicable to each of the railroad companies concerned, by which some sixty per cent of the amounts assessed against each of them was to be paid by the second of January next, or the bills would stand dismissed.

ORDERED ACCORDINGLY.

In re Obear.

In re OBEAR and In re THOMAS.

While the late amendment to the bankrupt act is retrospective in its operation so as to bring within it all cases commenced since December 1, 1873, and in which at the time of the passage of said amendment (June 22, 1874) the petitions for the adjudications remained to be acted on, yet it does not annul or disturb judgments rendered or adjudications made and in force at the time of the taking effect of said amendment.

(Before DILLON, Circuit Judge.)

Bankrupt Act—Retroactive Operation of Amendment of June 22, 1874.

THESE are petitions for review under section 2 of the bankrupt act.

Facts in the case of E. G. Obear. On the 4th day of May, 1874, a creditor's petition was filed against Obear in the district court for the eastern district of Missouri, stating that, being a broker and a trader, he did, on the 28th day of May, 1873, suspend, and did not within fourteen days, nor at any time thereafter, resume payment of his commercial paper. To an order to show cause, Obear appeared on the 18th day of May and admitted the petition, and he was thereupon, *on that day*, by the court, *adjudicated and declared a bankrupt*, and subsequently, June 22d, an assignee was elected, to whom a deed of assignment was made, and was regularly proceeding in the discharge of his duties until June 30th, when the district court, *on its own motion*, made the following order: "It is ordered that the petitioning creditor amend his petition within thirty days so as to conform to the 12th section of the act of Congress, approved June 22d, 1874, in the following respects, to-wit:

"1st. By alleging that the number of unsecured creditors who have joined therein constitute at least one-fourth in number, and that the aggregate of their debts, provable

In re Obear.

under this act, amounts to at least one-third of all the debts so provable.

“2d. Said amended petition shall be signed and verified by the first five signers thereof, if so many there be, in the manner and form required by said act.

“3d. The allegation in the original petition of the suspension of the debtor's commercial paper for fourteen days, shall be so amended as to aver the suspension and non-resumption thereof within a period of forty days before the filing of the original petition of his commercial paper made or passed in the course of his business as such broker or trader.

“And it is further ordered that all other proceedings in the case be stayed until said amended petition is filed.”

To this order the petitioning creditor, the bankrupt, and certain secured and unsecured creditors excepted; and it is to have the same reviewed that the petitioning creditor has brought the present petition.

Facts in the case of James S. Thomas. In this case a creditor's petition was filed against Thomas on the 25th day of April, 1874, duly charging as an act of bankruptcy the suspension of his commercial paper on the 15th day of November, 1873. Such proceedings were had that Thomas was regularly adjudicated a bankrupt on the 25th day of April, and his case referred to a register. Creditors met on May 30th, and resolved to proceed under section 43 of the bankrupt act, and appointed a committee of one, John G. Priest, as trustee, to whom all the property of Thomas was conveyed, and who has since then been engaged in winding up and settling the trust. On the 30th day of June the district court, on its own motion, entered an order similar to the one in Obear's case, above given, and which was excepted to in like manner, and is now here for review at the instance of the petitioning creditor, the bankrupt and other creditors.

In re Obear.

J. B. Woodward, for Obear's creditors.

Hill & Bowman, for Thomas's creditors.

No appearance *contra*.

DILLON, *Circuit Judge*.—In both the cases before me the proceedings in the district court were commenced after December 1st, 1873, and the adjudication of the debtors as bankrupts was made before the late act amending the bankrupt act took effect, and in neither of the cases had the estates then been fully settled.

The recent amendment to the bankrupt law makes several important changes in respect to involuntary bankruptcy, and among other changes it requires that at least one-fourth in number of the creditors, representing one-third in amount of the provable debts, shall petition for the adjudication; and the time of the suspension of the payment of commercial paper, constituting an act of bankruptcy, is extended from fourteen days to forty days, and it prescribes and limits what shall be considered such paper.

The amendatory act approved June 22d, 1874, is made retroactive in the following language:

“The provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter. And in all cases commenced since the 1st day of December 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned

In re Obear.

that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs," etc.

Undoubtedly the new act is retrospective in its operation so as to bring within it all cases commenced since December 1st, and in which, at the time of its passage, the petitions for the adjudication remained to be acted on.

Without entering upon the inquiry as to the competency of Congress to annul by mere legislative declaration prior adjudications of bankruptcy, regularly made, in pursuance of laws in force at the time, and the conveyance and acts thereunder, I am of the opinion that Congress did not intend by the amendatory act to overturn or disturb adjudications then already made and in force. The arguments in support of this view are derived from the language of the amendment; from the accepted principle of construction that statutes are to have no further or greater retrospective operation than plainly appears to have been the legislative intention; and from the failure of Congress to make any provision for the necessary consequences of setting aside all

In re Obear.

adjudications in bankruptcy, and all acts done under them throughout the United States for the seven preceding months.

While the language making the law retroactive as to cases commenced since December 1st is very broad and applies to "all cases" commenced since that day and prior to the passage of the amendatory act, yet it is obvious that the purpose of Congress was to put such cases upon the footing of new cases so as to enable them to participate equally in the benefits of the new provisions. But it is implied from the nature of the proceedings and the steps that are prescribed to be taken in respect to both old and new cases, that by the language quoted, Congress contemplated pending cases in which no adjudication had yet been made. The law requires the adjudication to be made upon the *petition* of creditors, and as amended, requires a given proportion of the creditors to concur, and limits the time within which, both as to old and new cases, the requisite number and amount must join in the petition. The court determines whether the requisite number and amount have or have not petitioned—if they have, the matter proceeds, and the adjudication will or will not be made, depending upon whether the alleged acts of bankruptcy are or are not established. On the other hand, if the statutory requirement as to the number and amount of creditors is not met, the provision is that the proceedings shall be dismissed. All this clearly shows that Congress had in contemplation cases in which no adjudication had been made, for these steps are all preparatory to an adjudication, and this view is further confirmed by the provision of section 13 amending section 40 of the original act.

Besides, it is impossible to suppose that Congress overlooked the fact that throughout the United States, between December and June, there were many hundred cases in bankruptcy in which adjudications had been made and

In re Obear.

which were in various stages of progress, some in which little had been done, others in which property had been sold, suits decided, and dividends made, but which were not yet entirely closed. If it had been intended by Congress to annul all that had been done under the bankrupt act since the first day of December, overturning adjudications, and disturbing settlements, payments, dividends, conveyances, etc., it is quite incredible that provisions would not have been made for this extraordinary and confused state of affairs. The amendatory act is silent as to the rights and remedies of the various parties who would be affected by legislation having this grave and extensive retrospective operation. The argument, then, is a strong one that no such consequences were intended; and the more so since the retroactive provisions may have full effect given them by holding them as intended to apply to all cases commenced since the 1st day of December which had not progressed to an adjudication at the passage of the amendatory act.

I am of the opinion, therefore, that the orders of the district court in each of the cases under review were erroneous, and they are accordingly reversed. These orders were purposely made as they were, not as necessarily embodying the opinion of the district court, but that they might present for review cases which would measure the scope of the retroactive operation of the amendatory act. And what I hold is that it does not affect decrees or adjudications then made, while conceding that its remedial provisions do in many respects apply to cases brought since December 1st, and which were pending when it went into operation.

ORDERS REVERSED.

NOTE.—The retroactive clauses of the late amendment to the bankrupt act have already, in several instances, come before the federal courts for construction and application.

In re Angell, 1 Cent. Law Journal, 363, LONGYEAR, J, July 9th, 1874, held that the provisions of § 12 of the amendatory bankrupt act of

In re Obear.

1874, which relate to the number and value of petitioning creditors apply only to cases where the petition for adjudication was still pending, and not to cases in which adjudications had passed upon the petition, before the approval of the act. So it was likewise held by *Blodgett, J. In re Scammon*, 1 Cent. Law Journal, 338.

Judge *Hopkins*, of the United States district court for the western district of Wisconsin, in the case of *Raffaux*, bankrupt, decided that the amendment did not disturb adjudications already made. The facts upon which the question arose were these :

The bankrupt has filed affidavit showing that the requisite number of his creditors did not petition for his adjudication according to the 12th section of the recent act amendatory of the bankrupt law, and moves that the proceedings be dismissed unless a sufficient number join in the petition within the time prescribed in said act. The petition was filed against the bankrupt in this case on the 5th day of February, 1874, and an order was made requiring him to show cause, on the 16th day of February, why he should not be adjudged a bankrupt, which was duly served upon him. On the 16th of February he was adjudged bankrupt by default, and a warrant issued to a messenger in due form, upon which his property was seized, and his creditors notified of the first meeting before the register to elect an assignee. On the day fixed an assignee was duly chosen by the creditors, who then and there accepted, qualified, and proceeded in the execution of his trust, under the assignment. He was pursuing his duties as such assignee when the amendatory act above mentioned was passed. The question raised in this case is whether the amendatory act applies to cases in the advanced condition this was when the act took effect.

The conclusion of the learned judge was expressed by him in the following language : " My conclusions upon the case here presented are, that it is not necessary to amend the petition, where there had been an adjudication before the amendment took effect ; that the provisions of the amendment in regard to the number and amount of the petitioning creditors do not apply to such cases ; but on the contrary, I hold that the judgment of adjudication based upon a petition conforming to the provision of the law in force when made, is valid, and as binding upon the debtor and his creditors as if the amended act had not been passed ; that the adjudication removes the case beyond the domain of legislative control. The motion of the bankrupt is denied."

The matter of *Rosenthal*, bankrupt, before the judge of the United States district court for the western district of Missouri, presented the following questions as stated in the opinion of Judge *KREKEL* : " Can a bankrupt by a mere protest made to the assignee, alleging want of jurisdiction in the court, in a case commenced since the 1st of Decem-

Lemoine v. Bank of North America.

ber, 1874, and prior to the late amendments of the bankrupt law, stop the declaring of a dividend which could legally be declared under the law prior to the amendments?" The court very properly held in the negative, and in the course of its opinion remarked:

"All parties, debtor as well as creditors, may be willing that the proceedings pending shall go on to final settlement. It would require a very plain provision of law to show that Congress intended to arrest and oust the court of the jurisdiction of a case which had been commenced and prosecuted under existing laws and progressed to the satisfaction of all parties."

Reduction of Fees—Fees of Clerk of District Court.—Section 18 of the amendment to the bankrupt act, approved June 22, 1874, provides that after its passage "the fees, commissions, charges and allowances, excepting actual and necessary charges and allowances, of, and to be made by the officers, agents, marshals, messengers, assignees and registers in bankruptcy, shall be reduced to one-half of the fees, commissions, charges and allowances heretofore provided for or made in like cases." *In re Hunt*, bankrupt, it was held by the circuit judge of the 8th circuit that this reduction applied to the fees of the clerk of the district court as well as to the fees, etc., of the other officers therein mentioned for services since June 22d, 1874.

J. B. S. LEMOINE, Assignee in bankruptcy of Earickson & Boyd, bankrupts, v. BANK OF NORTH AMERICA.

1. If the maker of an indorsed note carries it to a bank for discount on his own account, this is notice to the bank that the indorsement thereon appearing is an accommodation indorsement. Such is the presumption of law if there is nothing in the transaction to repel it.
2. If such indorsement be that of a firm, the bank discounting the note under such circumstances must, at its peril, ascertain whether there was any special authority, express or implied, for one partner to sign the partnership name as an accommodation indorser.

(Before DILLON, Circuit Judge.)

Accommodation Indorsements by Partnerships.—Power of Partner.—Notice.

APPEAL in bankruptcy. This is a contest between the Bank of North America, of St. Louis, and the assignee of

Lemoine v. Bank of North America.

Earickson & Boyd, bankrupts, respecting the liability of that firm on the indorsement of the name of the firm upon two promissory notes. A copy of one of these notes is as follows: "St. Louis, June 11, 1873. Sixty days after date we promise to pay to the order of Earickson & Boyd thirty-five hundred dollars, &c., at the Bank of North America, St. Louis, Mo. (Signed) White Brothers." Indorsed "Earickson & Boyd." The other note is for \$2,500, dated June 17th, 1873, at sixty days, with the same names as makers and indorsers as the note above copied.

From the evidence before it the district court found that the bank was entitled to have the amount of the two notes allowed against the *firm* assets. The assignee appealed under the 8th section of the bankrupt act, and in this court new pleadings were filed as in an action at law by the bank upon the indorsement. The question is whether the indorsement is binding upon the firm in favor of the bank. From the evidence the court below found the facts to be as follows:

Special finding of facts by the Court:— On the first day of January, 1873, the bankrupts, John K. Earickson and J. Will Boyd, formed a partnership under the firm name of Earickson & Boyd, and by articles of co-partnership both partners were prohibited from signing the firm name for the security or accommodation of third parties, and it was further stipulated that Earickson should have exclusive charge of the tobacco factory of the firm, and Boyd exclusive charge of the office and finances. The firm did not need, nor did they obtain any accommodation or borrow any money, except on drafts drawn against their sales of tobacco, which they sometimes discounted in bank. The Bank of North America had no knowledge or notice whatsoever of any of the above facts. The firm of Earickson & Boyd failed about the first of July, 1873, owing about sixty thousand dollars, of which amount only about thirty-five hundred dollars

Lemoine v. Bank of North America.

was legitimate indebtedness; the residue of the indebtedness having been created by Earickson, without Boyd's knowledge or consent, by using the firm name on commercial paper for his, Earickson's, private benefit, or by indorsing for White Bros., a firm not connected in any way with Earickson & Boyd. White Bros. were also accommodation indorsers on paper drawn in the name of Earickson & Boyd, by Earickson, and the firm received no benefit therefrom; on the contrary this was done without Boyd's knowledge or consent. The only circumstance coming to the knowledge of Boyd calculated to arouse his suspicions of his partner's wrong doings happened in March, 1873, when two or three bank notices came into their office, and knowing the firm had no paper out, he charged Earickson with having used the firm's name for his own private purposes. Earickson admitted he had done so in that instance, declared he had not in any other and would not again, that he had ample means to take up that paper and would do so. Boyd told him if that occurred again he would dissolve the firm. Earickson took up that paper and Boyd knew of no other paper having been given until after the failure of White Bros. on the 30th of June, 1873. Of these facts, however, the bank had no knowledge whatever. The notes upon which the claim is founded were made by White Bros. payable to the order of Earickson & Boyd and indorsed with the firm name of Earickson & Boyd by Earickson but without the knowledge of Boyd. White, one of the firm of White Bros., met a director of the bank in the street on the way to the bank to attend a meeting of the board, handing him the note, told him there was a note he would like to have "done" for him. The director took the note and laid it before the board and it was discounted, some of the members of the board stating that they understood Earickson & Boyd were a very good and responsible firm; both notes were presented and discounted in the same manner and about their respec-

Lemoine v. Bank of North America.

tive dates, but through different directors, the conversation with each being in substance the same, and in each case the proceeds were placed to the credit of Earickson & Boyd, and so entered on the books of the bank, according to the uniform custom of the bank, they being the last indorsers on the paper. The money was drawn from the bank on the checks of Earickson & Boyd, signed in the handwriting of Earickson, which checks were drawn to the order of White Bros. and indorsed by them.

These checks are as follows:—

“ST. LOUIS, June 11th, 1878.

“*Bank of North America* :

“Pay to White Brothers thirty-four hundred thirty-seven dollars and seventy-nine cents.

“\$3,437.79.

EARICKSON & BOYD.

Indorsed, “White Brothers.”

“ST. LOUIS, June 17th, 1878.

“*Bank of North America* :

“Pay to White Brothers, *proceeds discount*, twenty-four hundred fifty-five dollars and fifty-five cents.

“EARICKSON & BOYD.

Indorsed, “White Brothers.”

The notes were duly protested, and due notice given of their non-payment. Boyd was ignorant of all these transactions nor does it appear that the bank had any knowledge of the connection or relations of the two firms of White Bros. and Earickson & Boyd, except what appears on the paper in question.

In this court the counsel for the respective parties filed a stipulation that the case should be submitted to the court upon the above statement, which should be taken as an agreed statement of facts for all the purposes of this case.

Lemoine v. Bank of North America.

John G. Chandler, for the assignee.

John R. Shepley, for the bank.

DILLON, *Circuit Judge*.— On the facts found by the district court, upon which, by stipulation, the cause is submitted to this court, it is to be taken as true that the notes in question were indorsed with the firm name of Earickson & Boyd solely for the accommodation of White Brothers, the makers, without any consideration to the indorsers therefor.

It is also to be taken as true that this indorsement of the firm name was made by Earickson, without the knowledge or consent of Boyd and against the express stipulation on this subject in their articles of co-partnership; and that the notes when thus indorsed were returned to the possession of the makers, from whom the bank received them and at whose instance it discounted them, and who, through the checks of Earickson, drawn in the firm name, received the proceeds of the transaction. There is no finding or agreement that the indorsement of the firm name was made in accordance with any habit of dealing of the firm known to Boyd, or that there was with Boyd's knowledge such a course of dealing as respects accommodation indorsements in the firm name as to justify an inference of Earickson's authority to bind the firm in this manner.

I concede that in favor of third persons acting in good faith it is a presumption of law that notes indorsed in the name of the firm were indorsed on the partnership account, and hence the indorsement on the notes in question will bind the firm, unless it appears that the bank had notice that the indorsement was made outside of the partnership affairs (Story on Notes, sec. 72; Byles on Bills, 47; *Austin v. Vandermark*, 4 Hill (N. Y.), 259, 262, per NELSON, C. J.) But inasmuch as the settled rule of law is that it is not within the general scope of one partner to bind the firm by contracts of suretyship or to issue accommodation paper in the name of the

Lemoine v. Bank of North America.

firm for third persons, if the bank had notice that this was an accommodation indorsement, the burden of proof is upon it to show the assent of the other partners (either expressly or from the firm's course of dealing in this respect) or their subsequent ratification (Byles on Bills, 47, and cases cited in the notes). If, therefore, the bank discounted these notes without notice of the fact that the name of the firm had been indorsed upon them by one of the partners without the consent of the other and for the accommodation of the makers, it is entitled to hold the firm upon the indorsement, although in point of fact it was placed there by one of the partners in fraud of the rights of his co-partner, or without authority from him.

And the question on which the case turns is *whether the bank had such notice*, for it is not attempted to show that Earickson had authority from Boyd, express or implied, to make the indorsement. The bank is sought to be affected with such notice by virtue of the fact that after the notes bore the indorsement of the firm they were in the hands of the makers, who met one of the directors of the bank when on his way to a meeting of the board of directors, and giving him the notes asked him to have them discounted for the makers. It does not appear that the director informed the board of whom he had received the notes, but this is not material, for the learned counsel for the bank conceded on the argument that he supposed the law to be that the board or the bank would be chargeable with the knowledge of the director thus obtained.

Thus viewed, the real question in the case is reduced to this: Does the fact that the maker is in possession of a note before maturity, indorsed by another, affect the bank that receives it from the maker and discounts it for him, with the notice that it was indorsed for the maker's accommodation?

At the bar counsel stated that they had been unable to find any adjudged cases upon the exact point, and they

Lemoine v. Bank of North America.

argued it on general principles. In view of the nature of the notice required to defeat the rights of the holder for value of commercial paper, as settled by the supreme court of the United States in *Goodman v. Simonds* (20 How. 343), I was at first impressed in favor of the bank; but subsequent reflection has brought me to an opposite conclusion. To make accommodation paper is so entirely *extra* the business of a co-partnership and the legitimate authority of a partner, that the presumption is against, and properly against, the power of one partner thus to bind his co-partners; for suretyship, it has been well remarked is "a contract which carries with it a lesion by its very nature." (*Louisiana, ꝑc. Bank v. Nav. Co.* 3 La. An. 294.) Therefore when a bank has knowledge that an indorsement of the name of a firm is an accommodation indorsement it is bound at its peril to ascertain whether the members of the firm on whom it intends to rely assented to this use of its name. This it can easily do. While on the other hand, if the bank were entitled to presume that the other members of the firm assented, the presumption would in many instances, as in the case before us, be contrary to the fact, and highly disastrous to innocent partners, who would be without the means of guarding against the fraudulent use of the co-partnership name in unauthorized transactions.

If the facts of the case as found by the district court be considered there can be little doubt that the bank knew the discount was for the benefit of White Brothers, and consequently that the indorsement of Earickson & Boyd was presumptively, as it was in fact, for the accommodation of the makers.

On examination I find several cases distinctly asserting this to be law, and have not met with any holding a different view. When a note not due is taken by the makers to a bank for discount for their account, with an indorsement thereon, the presumption, unless there is something in the

Lemoine v. Bank of North America.

transaction to rebut it, is that the indorsers are sureties for the maker, and that they did not indorse it in the ordinary course of business. Upon this subject Mr. Chancellor WALWORTH, in *Stall v. Catskill Bank* (18 Wend. 478), holds this language: "If, therefore, it appears from the face of the paper that the partnership name is signed as surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He must, therefore, at his peril, make the necessary inquiries and ascertain that there is some special authority for one partner to sign the partnership name as such surety, express or implied. So if the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person, with the name of the firm indorsed thereon, *the transaction, on its face*, shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank or person who thus receives it from the drawer being thus chargeable with the notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm, who have been made sureties without their consent, are not liable to such holder of the note."

This language was quoted and approved by Mr. Chief Justice SAWYER, in giving the judgment of the supreme court of California, in *Hendrie v. Berkowitz*, 37 Cal. 113, 1869, and in which the court distinctly held, in a case precisely like the one now before the court, that the presumption was that the indorsement was an accommodation indorsement, and that the burden of proving the consent of the member who did not write the indorsement is upon the holder. So, in *Overton v. Hardin*, 6 Coldw. 375, 1869, the supreme court of Tennessee said: "There can be no doubt that the possession of an indorsed note by the maker is

Lemoine v. Bank of North America.

presumptive evidence that it was indorsed for his accommodation; Edwards on Bills, 103, 105; *Brown v. Taber*, 5 Wend. 566. *Erwin v. Shaffer*, 9 Ohio St. 43." In this last case BRINKERHOFF, J. says: "That although an indorsed note in the hands of the maker after due is presumed to have performed its office, and to have been paid off and taken up by the maker, yet no such presumption arises in the case of such a note before due; but that on the contrary, in such case, it is a matter of legal presumption that the note is unsatisfied, and is indorsed and placed in the hands of the maker for his accommodation (*Wallace v. The Branch Bank*, 1 Ala. 565; *Mauldin v. The Branch Bank*, 2 Ala. 502; *Stall v. Catskill Bank*, 18 Wend. 478." See, also, language of Mr. Justice NELSON, in *Bank of Rochester v. Bowen*, 7 Wend. 159; Byles on Bills, 47, and note).

The amount of the notes less the discount was, in accordance with a usage of the bank, placed to the credit of the last indorsers, in this case Earickson & Boyd, and was drawn out on the two checks of Earickson & Boyd, signed by Earickson, without the knowledge of Boyd, in favor of White Brothers. One of these checks showed on its face that it was for the proceeds of the note discounted, and the amount of each showed that it was for the note transactions. It is insisted that this makes the indorsement binding on both. This view rests upon the ground of ratification by Boyd; but the essential element of knowledge on his part, both of the fact of the indorsement and of the check being drawn, is wanting. The checks do not therefore change the rights of Boyd, or make binding upon him his partner's act in indorsing the firm's name to the notes in question. The district court erred in holding that the two notes were a claim upon the firm assets. The indorsement is alone binding upon Earickson.

JUDGMENT ACCORDINGLY.

Donovan v. The United States.

NOTE.—The court entered a judgment reversing the judgment below and entering a judgment against Earickson alone, and ordering a transcript thereof to be sent to the district court.

Same principle applied: See *St. Louis Sav. Bank v. Parmelee*, *post*.

FRANK J. DONOVAN, Administrator, &c., Plaintiff in Error, v.
THE UNITED STATES, Defendant in Error.

1. As respects the compensation of collectors of customs, the legislation of Congress divides these officers into two classes: 1st, collectors of the seven enumerated ports; 2d, all other collectors, i. e. collectors of non-enumerated ports (22 How. 299).
2. The acts of 1822, 1831, 1841, 1857, and of 1872, as to the compensation of collectors and surveyors of ports, construed, and it was held that the aggregate compensation of the surveyor of the port of St. Louis charged with the duties of the collector of customs, could not exceed the sum of \$5000 in any one year.

(Before DILLON, Circuit Judge).

Compensation of Collectors and Surveyors of Customs.

WRIT OF ERROR to the district court for the eastern district of Missouri. The error complained of is that the district court should have allowed compensation to the administrator's intestate (who was surveyor of the port of St. Louis under the act of Congress of March 2, 1831, on whom was devolved the duties of collector) of \$6000 per year instead of \$5000.

Wm. Patrick, district attorney, for the United States, defendant in error.

Sharp & Broadhead, Mr. Noyes and Mr. Wright, for the plaintiff in error.

DILLON, Circuit Judge.—Daniel H. Donovan was surveyor of the port of St. Louis charged with the duties of collector

Donovan v. The United States.

of customs, and the administrator of his estate contends that in the accounting with the United States he should be allowed under the act of June 8th, 1872, compensation upon the basis of \$6000 per year, instead of \$5000 as determined by the district court. The provision of this act is that the *compensation of such an officer shall be the same* as that given to collectors by the fifth section of the act of March 3d, 1841, not to exceed, however, the maximum amount therein allowed. In 1859 the supreme court of the United States construed the above mentioned act of 1841 in connection with the previous acts *in pari materia*, and decided that as respects compensation there were two classes of collectors: 1st, collectors of the seven ports enumerated in the 9th section of the act of May 7, 1822, whose total compensation from all sources might equal, but could not exceed, \$6000 in a year; and, 2d, all other collectors, *i. e.* collectors of the non-enumerated ports, whose aggregate compensation could not exceed the sum of \$5000 in any one year. (*United States v. Walker*, 22 How. 299, 1859.)

I am unable to discover in the act of 1872 satisfactory evidence that it was thereby intended to abrogate in favor of surveyors discharging the duties of collectors this established distinction *in respect to compensation* between what is termed the enumerated and the the unenumerated ports.

The act of 1841, *as authoritatively construed*, limited the aggregate compensation of a collector of one of the enumerated ports to \$6000, and of a collector of any other port to \$5000, but while it did provide for the compensation of surveyors it did not provide a specific compensation for a surveyor who under the act of 1831 performed the duties of a collector of customs.

This was sought to be remedied by the act of March 3d, 1857, but as its phraseology was not clear, and as complaints were made that it was illiberally restricted by the accounting officers at the treasury department to the sur-

 Opdyke v. The Pacific Railroad.

veyors of the principal ports under the 9th section of the act of 1822 (Cong. Globe, 2d sess. 43 cong. part 4, p. 3409), the act of 1872, upon which the plaintiffs in error rely, was passed. This last named act places "all surveyors of customs ports performing the duties of collectors" upon the footing, as respects compensation of collectors, under the act of March 3d, 1841, for *like* services. St. Louis being a non-enumerated port, the maximum allowance to a collector can in no event exceed \$5000,—and this sum is in my judgment the limit of compensation to which the surveyor of the port of St. Louis is entitled. I concur in the opinion of the district judge, and the judgment below is accordingly affirmed.

AFFIRMED.

NOTE.—The judgment was affirmed by the Supreme Court, February 1874.

 GEORGE OPDYKE v. THE PACIFIC RAILROAD.

1. When one who is not a party to a written agreement, but who is the person to be benefited by a performance of stipulations therein, may maintain an action against the promissor, considered.
2. On demurrer, held, that if the facts alleged in the petition were true, the defendant had made itself liable for the payment of interest on bonds issued by another railroad company, containing a representation that the defendant had in consideration of a lease to it of the road of such company, guaranteed the payment of such interest.

(Before DILLON and TREAT, JJ.)

Contracts.—Right of Strangers to Enforce Stipulation for their Benefit in Contracts Between Other Persons.—Guaranty.

On demurrer to the answer. The plaintiff brings this action at law to recover of the Pacific Railroad Company of Missouri the amount of seventy-three coupons for in-

Opdyke v. The Pacific Railroad.

terest due Nov. 1st, 1873, upon that number of bonds, of the St. Louis, Lawrence & Denver Railroad Co. The action is brought upon the theory that the facts stated in the petition make the defendant (the Pacific Railroad Company), liable by reason of a guaranty or promise for the benefit of each bearer of the bonds of the Lawrence Company, above named, to pay the interest thereon for the full period for which said bonds were to run.

To understand the questions made by the demurrer to the answer, it is necessary to state the substantial parts of the pleadings.

The petition alleges that the defendant, the Pacific Railroad, is a railroad corporation, incorporated, organized and acting, and was so at the several times hereafter mentioned, under and by virtue of the laws of the State of Missouri, and particularly an act of the general assembly of the state of Missouri, entitled "An Act to Incorporate the Pacific Railroad," approved March 12th, 1849.

Plaintiff says that the St. Louis, Lawrence & Denver Railroad Company was, at the several times hereafter mentioned, a railroad corporation, duly authorized, organized and acting under and by virtue of the laws of the states of Kansas and Missouri, for the purpose of making, constructing, equipping and using a railroad extending from Pleasant Hill, in the State of Missouri, to Lawrence, in the State of Kansas.

That at the time of the formation of said last named corporation for said purpose, the said defendant, the Pacific Railroad, was engaged in operating a railroad from St. Louis to Kansas City, Missouri, and that another railroad corporation named the Union Pacific Railroad Company, eastern division, commonly called Kansas Pacific Railroad Company, was engaged in operating a railroad from Kansas City, in Missouri, to Denver, in the Territory of Colorado, and that the two railroads last named were, on and before November,

Opdyke v. The Pacific Railroad.

1870, being operated harmoniously and so as to contribute to each others success.

That the said St. Louis, Lawrence & Denver Railroad Company was organized for the purpose of making a new connection between said Kansas Pacific and said Pacific (commonly called Missouri Pacific) Railroads, and which road and the use of which was then and there expected by said Pacific Railroad Company of Missouri to be of great value and benefit to it.

And plaintiff says that it was, by and between said St. Louis, Lawrence & Denver Railroad Company and said defendant, then and there known that a large sum of money would be essential to enable said St. Louis, Lawrence & Denver Railroad Company to build its said road, and that no sufficient security would or could be by said last named company given to enable it to negotiate or sell its bonds or evidence of indebtedness in the market.

And plaintiff says that said defendant then and there, in view of the supposed advantage to accrue to it by the creation, construction and use of said railroad by said St. Louis, Lawrence & Denver Railroad Company, and to make a security sufficient to induce the purchase of the bonds of said last named company, and in contemplation of the execution and issue of the bonds by said last named company for the sum of one million dollars, bearing interest at the rate of six per cent per annum in gold, payable semi-annually at the National Bank of Commerce in the city of New York, and expressly for the purpose of providing a fund sufficient to meet said interest, did heretofore, to-wit, June 14th, 1870, make and enter into a certain lease and contract with said St. Louis, Lawrence & Denver Railroad Company, in the words and figures following, to-wit :

"This lease and contract, made the fourteenth day of June, eighteen hundred and seventy, between the St. Louis, Lawrence & Denver Railroad Company, a corpora-

Opdyke v. The Pacific Railroad.

tion re-organized by consolidation under the laws of the state of Kansas and the state of Missouri, of the first part, and the Pacific Railroad Company, of Missouri, duly incorporated by the laws of the state of Missouri, of the second part; *Witnesseth*: That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter mentioned and contained, and by them to be kept and performed, and of one dollar paid by the party of the second part to the party of the first part, has granted, leased and demised, and by these presents doth grant, lease and demise unto the party of the second part, and their successors, the whole of the railroad of the party of the first part as now located and *hereafter to be built* and constructed by the party of the first part from its terminus, to-wit, from the city of Pleasant Hill, in the county of Cass and state of Missouri, thence westwardly across the state line, upon the most direct and practicable route to its terminus at the city of Lawrence, in the county of Douglas and state of Kansas, say fifty-eight miles, more or less, making a junction with the Leavenworth, Lawrence & Galveston Railroad, at said last mentioned city, with all the lands, railways, rails, side-tracks, bridges, rights of way, depots, stations, turn-tables, water stations, station houses, and all other buildings and improvements, and appurtenances of every nature whatsoever, now enjoyed, held or owned, or which may hereafter at any time be acquired by said party of the first part for the purpose of operating said railroad. * * * *

“*To have and to hold* said demised railroad and premises as aforesaid to the Pacific Railroad Company, its successors and assigns, for and during the term of thirty years, from the first day of August, A. D. eighteen hundred and seventy-one (1871) or as much sooner as the said road shall be completed, delivered to, and accepted by said Pacific Railroad Company, ready for operation; and in considera-

Opdyke v. The Pacific Railroad.

tion of the premises the parties hereto have respectively covenanted and agreed to and with each other for themselves, their respective successors and assigns in manner following, viz :

"1st. That they, the party of the first part, shall furnish, provide and pay for, when payment shall be required, all the right of way for the line of said railroad, one hundred feet in width, and all the land for station houses and all other buildings on the line of said railroad; shall also pay for all work to be done and materials to be used or furnished for use in or about the location or construction of said railroad or its appurtenances, and complete and deliver the same to the party of the second part, in good condition for operating and in all respects equal in its construction to the Pacific Railroad (of Missouri), and of a like guage therewith.

"2d. That the party of the second part and its assigns, shall and will at all times during the continuance of the hereby demised term, after the delivery and acceptance thereof, in good faith, work, use, manage, maintain and operate and keep in use and repair the said railroad of the party of the first part, with its appurtenances, and with such locomotives, cars and rolling stock as the said party of the second part shall deem to be necessary, reasonable and proper for the full accommodation of the business of the road.

"3d. That the party of the second part will, at their own cost, employ during the continuance of the said demised term, all such superintendents and employes as shall by them be deemed necessary to maintain, work, use and operate said railroad hereby demised, and shall and will return and deliver up the said railroad at the expiration of the hereby demised term in good order and repair.

"4th. That the party of the second part, and its assigns, shall at all times during the hereby demised term have the

Opdyke v. The Pacific Railroad.

full and exclusive right to manage and control the said demised railroad and premises, and to regulate and determine the rates of tolls, freight and charges of all the transportations over the whole or any part of the demised railroad and premises, and to charge and collect the same and appropriate the same to their own use, and shall have, use and exercise and enjoy all the rights, power and authority over the railroad aforesaid, and all powers and privileges now possessed or which may hereafter be acquired by the party of the first part, relating to the said road as herein provided, which can or may be lawfully exercised and enjoyed on and about said demised railroad and premises.

“5th. It is further agreed that the party of the second part shall pay the party of the first part *an annual rental* for the use of said road of thirty-five (35) per cent of the gross earnings thereof for the first ten years from the acceptance of said road, and for the next twenty years following the first ten, or for the period of any renewal, an annual rental of thirty-three and a third ($33\frac{1}{3}$) per cent of the gross earnings of said road; and in determining the gross earnings all receipts for passengers or freights over said road shall be pro-rated with the Pacific Railroad solely with reference to distance of carriage upon the respective roads.

“6th. Whereas the St. Louis, Lawrence & Denver Railroad is about to issue its first mortgage bonds upon the said railroad for the sum of one million dollars, bearing interest at the rate of six per cent per annum, in gold, payable semi-annually at the National Bank of Commerce in the city of New York; and whereas, the said company has agreed to pay all taxes upon the said road and to fence the same and make other expenditures hereinafter particularly specified; now, for the purpose of providing a fund sufficient to meet the said interest (and to make the other payments referred to) the Pacific Railroad Company covenants and agrees to pay the said Bank of Commerce, on account

Opdyke v. The Pacific Railroad.

of said rental, to the credit of the interest account of said St. Louis, Lawrence & Denver Railroad, the sum of sixty thousand dollars in gold annually, thirty thousand (\$30,000) of which shall be paid on or before the first day of May, and thirty thousand (\$30,000) on or before the first day of November in each year after the delivery to and acceptance of said road by the Pacific Railroad Company, under the terms of this lease, and has also agreed to pay said company the sum of fifteen thousand dollars (\$15,000) in current money, payable one-half on the first day of January and the remainder on the first day of July at the office of the Pacific Railroad Company, making in all the sum of seventy-five thousand dollars (\$75,000), to be paid annually during the entire period of the lease.

“ And it is expressly covenanted and agreed, that if the said sum of sixty thousand dollars (\$60,000) in gold, with the premium thereon, and fifteen thousand dollars (\$15,000) in currency, should amount to more than the amount to the credit of said St. Louis, Lawrence & Denver Railroad Company, as rental upon the per centage of gross receipts hereinbefore specified, the excess paid by said Pacific Railroad Company, with the premiums paid for gold, shall be charged to said St. Louis, Lawrence & Denver Railroad Company, and shall bear interest at the rate of ten (10) per cent per annum, until such per centage of gross receipts shall itself be sufficient to provide for the annual payments of said sum of sixty thousand dollars in gold and fifteen thousand dollars in currency, and thereafter any surplus to the credit of said St. Louis, Lawrence & Denver Railroad Company over and above the amount so required shall be retained by the said Pacific Railroad Company (of Missouri) until the amounts so advanced, with premiums and interest at the rate of ten per cent, shall have been fully reimbursed to said company.

Opdyke v. The Pacific Railroad.

"And it is expressly stipulated and agreed, that until all amounts so advanced by said Pacific Railroad Company shall be fully reimbursed and paid, said Pacific Railroad Company shall have a lien upon the road and franchises of said St. Louis, Lawrence & Denver Railroad Company to the amount of such advance and interest, and no incumbrance, mortgage or lien of any kind or character, except the said mortgage for one million dollars, shall be placed upon said road without the consent of the board of directors of the Pacific Railroad for the time being, until all the amounts so due shall be fully satisfied and paid.

"It is expressly agreed, that for any fractional portion of a period of six months elapsing between the acceptance of said road and the maturity of the first interest payment thereafter on the first mortgage bonds, said Pacific Railroad Company shall pay only a pro-rata share in accordance with the time so elapsing.

"9th. And it is further agreed and understood, that the said party of the first part shall pay all taxes and assessments at any time hereafter imposed under the authority of the United States, state, county or city laws upon the whole or any part of said road, its buildings or appurtenances hereby demised, and also all taxes which may hereafter be imposed by authority of law, either federal or state, upon the capital stock and the dividends thereon, or upon their bonds or interest thereon, which said party of the first part are or may be liable to pay, and also the interest and principal of any bonds or other debts incurred by the party of the first part, when the same shall mature, and in case of the neglect or refusal of said party of the first part to pay said taxes and liabilities which may be or can be collected by levy on said road, then the said party of the second part shall be authorized to pay said taxes and demands, and shall deduct the amount so paid for taxes, etc., from said semi-annual payments in currency, as they may become due, and

Opdyke v. The Pacific Railroad.

the receipts for said payments, so made by said party of the second part shall be taken by said party of the first part on account of such payment to the extent aforesaid. * * *

"12th. It is further agreed and understood between the parties, that the party of the first part shall fence the said road with a good and sufficient fence of such height as may be required by the laws of Kansas and Missouri; and one third part of said fence shall be erected *within two* years, one third part additional within four years, and the whole within six years from the date of acceptance of said road by the party of the second part. The general superintendent of the said second party shall designate the parts of said road which shall be first fenced. But if the said Pacific Railroad Company shall deem the erection of such fence necessary before the period named, said company shall have the right to erect the same and charge the cost thereof, with interest at the rate of ten per cent per annum, to said party of the first part, to be reimbursed out of its proportion of gross receipts as provided in section sixth (6)."

After setting out in full the sixth section of the contract as above given, the petition alleges that it was intended by defendant, by means of the several parts of said agreement of lease, to create a security for the payment of the interest of said bonds as the same became due for the whole period of the existence of said bonds and said lease, and to induce persons desiring to invest their money to purchase said bonds on such security offered by defendant, and that in pursuance of said intention and design on the part of said defendant, plaintiff says that said St. Louis, Lawrence & Denver Railroad Company did, afterwards, to-wit, on the first day of May, 1871, by its president, George W. Dietzler, attested by its secretary, B. W. Woodward, and under its corporate seal, all then and there duly authorized, make, execute and offer for sale, for money, its one thousand certain writings obligatory or bonds, each for the sum of one

Opdyke v. The Pacific Railroad.

thousand dollars, payable twenty-five years after its date, and each of which was in words and figures following, to-wit:

“St. Louis, Lawrence & Denver Railroad Company of the State of Kansas. First Mortgage Bond. No.—. \$1000. Interest six per cent per annum, payable semi-annually, at the National Bank of Commerce, in the city of New York, principal and interest payable in gold, secured by mortgage of road and *payment of interest guaranteed by the Pacific Railroad of Missouri*. Know all men by these presents, that the St. Louis, Lawrence & Denver Railroad Company acknowledges itself to be indebted to the holder of this bond in the sum of one thousand dollars, which said sum it promises twenty-five years after date hereof to pay to the bearer in gold, at the National Bank of Commerce, in the state and city of New York, negotiable and payable without defalcation or discount, with interest from date at the rate of six per cent per annum, payable semi-annually on the first days of May and November of each year, in gold, at the aforesaid bank, on the presentation of the interest coupons hereto attached. This bond is issued to aid in the completion of the St. Louis, Lawrence & Denver Railroad and is secured by a first deed of trust on said road, duly executed and stamped in accordance with the revenue laws of the United States and recorded in the recorder's offices for the counties of Douglas and Johnson, Kansas, and Cass county, Missouri, in and through which said railroad passes. Said deed of trust is on said railroad and all its franchises, and is executed to the Union Trust Company of New York, as trustee, and *the payment of interest is secured by a contract of lease with the Pacific Railroad of Missouri, dated June 14th, 1870*. In testimony whereof, the said St. Louis, Lawrence & Denver Railroad Company has caused this bond to be signed by its president and attested by its secretary, and its corporate

Opdyke v. The Pacific Railroad.

seal affixed, and the interest coupons attached to be signed by its president. Done at the city of Lawrence in the county of Douglas, state of Kansas, this first day of May, A. D. 1871.

" Attest, B. W. WOODWARD,

“ [SEAL.] ”

And to each of which said bonds there were then and there annexed fifty instruments in writing, or coupons, signed by said president for said company, in words and figures following, to-wit :

" \$30. Kansas. \$30.

“The St. Louis, Lawrence & Denver Railroad Co. will pay to bearer, on the first day of—, 18—, thirty dollars in gold, at the National Bank of Commerce, in the city of New York, on the presentation of this coupon, being interest due on bond No.—.

"GEO. W. DIETZLER, President."

Said coupons being payable respectively on the first day of May and first day of November in each of said twenty-five years, from 1871 to 1896.

And plaintiff says that after said agreement by and between said St. Louis, Lawrence & Denver Railroad Company, and said Pacific Railroad (of Missouri), as hereinbefore set forth, was made, and at the time said bonds and coupons were made and executed by said St. Louis, Lawrence & Denver Railroad Company, and when the same were being offered for sale in the market, and to induce purchasers to buy the same, *it was, with the knowledge and approval, and by request of said defendant, expressly stated on the face of said several bonds, that the payment of interest thereon was guaranteed by said defendant.* And plaintiff further says, that by the express terms of sale of said bonds, it was further, with the express knowledge and approval, and at re-

Opdyke v. The Pacific Railroad.

quest of said defendant, to induce the purchase of said bonds by whomsoever might desire the same, expressly stated therein that the payment of interest thereon was secured by a contract of lease with said defendant, dated June 14th, 1870 (meaning the lease and contract aforesaid).

And plaintiff further says, that afterwards, to-wit, on the 22d day of December, A. D. 1871, the defendant, by its president, did, under and in pursuance of said contract and lease, receive and accept the said St. Louis, Lawrence & Denver Railroad, and did then and there enter upon said lease.

And plaintiff further says, that thereupon, by and with the approval, and at the request of said defendant, and with the said facts and inducement expressed on the face of said bonds, said St. Louis, Lawrence & Denver Railroad Company did proceed to offer and negotiate said bonds for sale, and by means of the premises plaintiff was induced to purchase seventy-three of said bonds, relying upon the said promises and agreements of said defendant to pay said sums of money, to meet the semi-annual installments of interest thereon. And plaintiff further says, that afterwards, and as the same became due, the defendant, with full knowledge of all the facts aforesaid, did promptly pay at the place where the same were made payable, the several installments of interest on said bonds, as the same became due, up to the installment due and payable on the first day of November, A. D. 1873, which defendant then and there failed to pay. Plaintiff says that by means of the premises, the defendant did promise and agree, to and with each and every of the bearers of said several bonds and coupons, as the same became and were negotiated and sold, as aforesaid, and for the purpose of providing a fund sufficient to meet said interest, to pay the said Bank of Commerce on account of said rental, to the credit of said interest account, the sum of sixty thousand dollars, in gold, annually, thirty

Opdyke v. The Pacific Railroad.

thousand dollars of which should be paid on or before the first day of May, and thirty thousand dollars on or before the first day of November, in each year, after the delivery and acceptance of said road by defendant, for the entire period of thirty years, unless said bonds were sooner paid. And plaintiff says, that the defendant, by means of the premises, did agree and guarantee, to and with plaintiff, when he became the holder and bearer of each of said bonds, that the interest thereon, as the same became due, was collectible, and that the defendant would pay the same, in gold, at said Bank of Commerce, for the use of plaintiff. And plaintiff says, the defendant has not performed its said agreement and promise to pay said interest that became due on November 1st, 1873, and that there is \$30 now due on each of said several bonds, owned by plaintiff, and of which he is the bearer, and said last named company promised to pay to bearer on the first day of November, 1873, in gold at the National Bank of Commerce, in the city of New York, on the presentation of said coupon, being interest due on said bond No.—, etc.

And plaintiff further says that before the negotiation and sale of said bonds and coupons to plaintiff, and to induce plaintiff to purchase the same, the said defendant, then and there, a corporation duly authorized thereunto, did, for value received, promise to pay said Bank of Commerce, for the use of the bearer of said coupon, the amount thereof, on said first day of November, A. D. 1873, in gold; and plaintiff relying on defendant's said promise, did purchase same. That plaintiff was, at the date last aforesaid, and is now, the bearer of said coupon, that defendant did not pay the amount of same to said bank, and though often requested, hath failed, and does still fail and refuse to pay the same, or any part, to said bank for use of plaintiff. Wherefore, plaintiff asks judgment for said sum of thirty dollars, with interest from November 1st, 1873, in gold, with ten per cent damages.

Opdyke v. The Pacific Railroad.

The defendant filed an answer in denial and also setting up new matter. To this new matter the plaintiff demurred, on the ground that it constituted no defence to the causes of action in the petition. The portion of the answer demurred to is as follows :

“ And for further answer in the premises and to each and every count in said petition, defendant alleges that the said St. Louis, Lawrence & Denver Railroad Company did not perform the stipulations and covenants on its part contained in said contract.

“ Said St. Louis, Lawrence & Denver Railroad Company did not build said road in the manner and of the character and with the equipments and appurtenances required by said contract; said St. Louis, Lawrence & Denver Railroad Company did not furnish or provide or pay for, when payment was required, a large part of the right of way and land required for said road and the station houses and other buildings on the line of said road, but a large portion thereof still remains unpaid for, whereby defendant has been subjected to many vexatious law suits, and has been obliged to pay out large sums of money, on account of said failure on the part of said St. Louis, Lawrence & Denver Railroad Company, which has never been repaid defendant, but still remains due and unpaid.

“ Defendant further alleges, that said St. Louis, Lawrence & Denver Railroad Company failed to pay for a large amount of work done and material used and furnished for use, in and about the location and construction of said railroad and its appurtenances, as required by said contract, whereby defendant has been subjected to many vexatious law suits, and has been obliged to pay out large sums of money on account of said failure of the St. Louis, Lawrence & Denver Railroad Company, which money has never been repaid, but still remains due and unpaid.

Opdyke v. The Pacific Railroad.

“Defendant further alleges, that said St. Louis, Lawrence & Denver Railroad Company failed, neglected and refused to build the fence which by said contract it agreed to build, although the general superintendent of the defendant has designated the parts of said road which should be fenced, and said fence has never yet been built, although, by the terms of said contract, said fence should have been built long ago, and by reason of said failure, defendant has been obliged to pay out large sums of money for cattle killed and other damages, for which sums it has never been reimbursed.

“And said St. Louis, Lawrence & Denver Railroad Company has failed to pay any of the taxes levied by the states of Missouri and Kansas, and the several counties and other municipal corporations therein, upon said railroad and its appurtenances, and other property demised by said lease, although by said contract the said St. Louis, Lawrence & Denver Railroad Company agreed to pay the same, and by such failures, defendant has been forced to expend large sums of money, which have never been reimbursed. And the amounts paid out by defendant by reason of the several defaults and omissions of the St. Louis, Lawrence & Denver Railroad Company, hereinbefore set out, far exceeded, each year, the sum of fifteen thousand dollars.

“Defendant further alleges, that the thirty five per cent of the gross earnings of said St. Louis, Lawrence & Denver Railroad Company never, in any year, equalled fifty thousand dollars a year, but in truth did not amount to that sum. And each and all of said defaults and neglects on the part of said St. Louis, Lawrence & Denver Railroad Company existed long prior to November 1st, 1873, and remain in that condition until this day.

“And said St. Louis, Lawrence & Denver Railroad Company being unable to reimburse defendant for the sums expended by it on account of the several neglects and defaults

Oudyke v. The Pacific Railroad.

on the part of said St. Louis, Lawrence & Denver Railroad Company, above set out, and being unable to give defendant any security or assurance that it would do so, the defendant and the said St. Louis, Lawrence & Denver Railroad Company, mutually agreed to, and did, on the—day of December, 1873, rescind, cancel and annul said contract set out in the petition made as therein stated, and all other contracts supplementary and amendatory thereto, and the said property by said contract demised was then delivered to the said St. Louis, Lawrence & Denver Railroad Company, and the said St. Louis, Lawrence & Denver Railroad Company did then and there, for a valuable consideration, release and absolve defendant from the performance of any and all the covenants in said lease and contract contained.”

Noble & Orrick, for the plaintiff.

James Baker and J. N. Litton, for the defendant.

DILLON, *Circuit Judge*.—On June 14th, 1870, the defendant made a contract with the St. Louis, Lawrence & Denver Railroad Company, to lease its road for thirty years. This “lease and contract” is under the seal of the two companies. It appears from the instrument that the road thus leased was then located, but was thereafter to be constructed by the lessor. The defendant agreed to operate the road during the whole of the demised term and to keep the same in use and repair. The defendant was to pay to the lessor (the Lawrence Company) “as an annual rental for the use of said road thirty-five per cent of the gross earnings thereof for the first ten years, and thirty-three and one-third per cent for the next twenty years.” Then follows the sixth section of the contract, which recites that the Lawrence Company is about to issue \$1,000,000 first mortgage six per cent gold bonds, payable at the Bank of Commerce, New

Opdyke v. The Pacific Railroad.

York, and that that company had agreed to pay all taxes upon its road and to fence the same, and concludes thus:—
“Now, for the purpose of providing a fund sufficient to meet said interest (and to make the other payments referred to), the Pacific Railroad Company covenants and agrees to pay the *said Bank of Commerce* on account of said rental, to the credit of the interest account of said St. Louis, Lawrence & Denver Railroad, the sum of \$60,000 in gold annually, \$30,000 of which shall be paid on or before the 1st day of May, and \$30,000 on or before the 1st day of November in each year, and has also agreed to *pay said company* \$15,000 in current money each year, making in all \$75,000 to be paid annually *during the entire period of the lease.*” This was to be paid irrespective of what at the stipulated rate the actual rental would amount to. Any excess was to be charged by the defendant to the Lawrence Company, and was made a lien upon its road and franchises.’

The bonds subsequently issued by the Lawrence Company, as to amount, rate of interest, place and times of payment, corresponded with these provisions in the contract between the two companies, and contained on their face this statement: “Payment of interest guaranteed by the Pacific Railroad of Missouri;” also the statement: “The payment of interest is secured by a contract of lease with the Pacific Railroad of Missouri, dated June 14th, 1870.” These bonds were sold in the market, and the plaintiff, as he alleges, became the owner of seventy-three of them, on which interest was paid out of the fund provided for in the lease until November 1st, 1878, when the payment of interest ceased, and in December, 1878, as the answer alleges, the contract and lease of June 14th, 1870, was rescinded and the property surrendered by the defendant to the Lawrence Company.

The plaintiff alleges that to induce persons to buy the bonds, the present defendant requested the statements to be

Opdyke v. The Pacific Railroad.

made therein that the payment of interest was guaranteed by it and secured by the contract of lease of June 14th, 1870; that it approved of this statement in the bonds, and afterwards, with full knowledge of these facts, and that the purchase of bonds had been induced thereby, paid to the Bank of Commerce the several installments of interest on said bonds up to that which fell due November 1st, 1873.

Assuming these allegations of the petition to be true, our opinion is that they constitute a good cause of action in favor of the plaintiff, and one which may be enforced in an action at law directly against the defendant. The petition does not count upon the promise of the defendant in the sixth article of the contract to provide annually a fund of \$60,000 with which to pay that amount of interest on the bonds, as the sole ground of the defendant's liability to the bondholders, but states this promise on the part of the defendant as only one of the elements of such liability.

There is much conflict in the judgment of the courts as to the right of third persons for whose benefit stipulations are made in a contract between other persons, to enforce those stipulations against the promissor. And the general rule undoubtedly is, that one who is a stranger to the contract, that is not a party to it, and from whom the consideration for the promise does not move, and to whom the promise is not made, cannot enforce it by action, although he would be benefited if the promise were kept and be injured if broken; and the difficulty has frequently been considered to be increased where the contract is under seal. The adjudications on the subject are collected and examined by the editors of the American Leading Cases (Vol. 2, pp. 164, 837), and it is not proposed here to review them, nor to determine whether the present case, if the plaintiff relied alone upon the promises of the defendant in the lease and contract of June 14th, 1870, would fall within the general principle. In form the promise of the defendant in the

Opdyke v. The Pacific Railroad.

sixth article of that lease is to the Lawrence Company; and, in form, at least, that company, and not the bondholders, furnished the consideration for the promise of the defendant to pay annually on account of the interest on the proposed loan, the sixty thousand dollars. In reality, however, it is probable the bondholders under the mortgage furnished to the Lawrence Company the means to build the road, the use of which under the lease constituted the consideration of the defendant's promise. But it is not necessary to determine whether upon the lease alone the plaintiff would have any action, because, as above observed, he does not bring his suit upon this theory. This claim of the plaintiff is, that the defendant being interested in the construction and completion of the Lawrence road, and having become bound to the Lawrence Company to pay it \$60,000 in gold, annually, to enable it to negotiate its bonds and raise money to build the road, and to keep the road when built out of the way of the foreclosure of the mortgage securing the bonds (the Lawrence road having no resources except its earnings or rental), the defendant caused or consented to the representations contained in the bonds, that it had guaranteed and would pay the interest on them annually during the entire term of its lease, which was longer than the period when the bonds by their terms fell due. If this allegation can be proved, our opinion is that the defendant is bound to make good the guaranty, and that this guaranty attaches to and follows the bonds and is available to every holder of them who relied upon it. In this view the promise by the defendant is a direct one to whoever becomes the holder of bonds on the faith of it, and, although the facts are different, the case falls within the principle of morality, fair dealing, and enlightened justice asserted by the supreme court of the United States in the cases of *Laurason v. Mason*, 3 Cranch, 492, annotated 2 Am. Lead. Cases, 298; *Woodruff v. Trapnall*, 10 How. 206; *Curran v. Arkansas*, 15

Webster v. Woolbridge.

How. 804; *Furman v. Nichols*, 8 Wall. 50. If the foregoing is a correct view of the legal relations and rights of the parties, it follows that the contract between the defendant and the plaintiff was complete when the plaintiff bought the bonds upon the strength of the promise or representation which the defendant authorized (as it is alledged) to be made, and that the plaintiff's rights are in no wise dependent upon whether the Lawrence Company kept its contract in respect to taxes, fences, &c., and could not be affected by a subsequent rescission of the contract of June 14th, 1870, and the surrender of the road by the defendant to the Lawrence Company. For these reasons the demurrer to the affirmative defence in the answer is sustained.

TREAT, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—As to the enforcement of promises made by one person to another for the benefit of a third, the latest cases in New York are *Clafin v. Ostrom*, 54 N. Y. 581, decided by the commissioners of appeals in January, 1874, and *Merrill v. Green*, 55 N. Y. 270, decided by the court of appeals in December, 1853, and which seem to be conflicting.

THOMAS WEBSTER, Assignee in Bankruptcy of Powhatan Woolbridge, Appellant, v. JOHN M. WOOLBRIDGE, Appellee, and PHILIP C. TAYLOR.

1. A lien on real estate lawfully obtained under a valid judgment, by a creditor before the commencement of the proceedings in bankruptcy against the judgment debtor, is protected against the bankrupt act, and is good against the assignee in bankruptcy.
2. Without statute provision an execution is *functus officio* after the return day; but by the legislation of Missouri, where a levy on land has been duly made, the power to sell exists after return day, for the execution and lien thereby created are by statute continued in force until the end of the second or later term of the proper court, if a sale be not made at the next term after the levy.

Webster v. Woolbridge.

3. These principles applied and held to preserve a lien of a judgment creditor although no sale had been made under his levy.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Lien of Judgment.—Execution Sales.—Return Day.—Sale After Return Day.—Missouri Statutes as to Time of Execution Sales, Construed.

APPEAL IN BANKRUPTCY. On the 9th day of May, 1872, John M. Woolbridge obtained a judgment in the Pettis county circuit court against Powhatan Woolbridge for \$6,269.08 on which an execution was issued, tested May 21, 1872, directed to the sheriff of St. Louis county, returnable at the September term, 1872, of the Pettis county circuit court. This suit was levied by the sheriff of St. Louis county on real estate of the said Powhatan on May 28, 1872, and the sale advertised for the 19th day of June ensuing.

On the 18th day of June, 1872, a petition in bankruptcy was filed against the said Powhatan in the district court of the United States for the eastern district of Missouri, at St. Louis, and on that day the Central Bank of St. Louis, representing itself to be a creditor of the said Powhatan, filed in the said federal district court a bill in equity against the said John M. Woolbridge and P. C. Taylor, the sheriff of St. Louis county, stating the foregoing facts, and averring that the said judgment was fraudulent under the bankrupt act, and praying that the defendants be restrained from enforcing the judgment or making the sale. On June 19th a provisional injunction was ordered as prayed, which was continued in force until June 29th, 1872, on which day the court made the following order: "Ordered that the provisional injunction be dissolved, and with the consent of the parties, it is further ordered, that P. C. Taylor, sheriff, do proceed to sell under the execution the real estate levied

Webster v. Woolbridge.

on, and hold the proceeds subject to the further order of this court."

For some reason, which does not appear, this sale was not made by the sheriff; and, on the 31st day of August, 1872 (the suit being returnable to the September term, 1872), he returned the execution with a return thereof of his levy, May 23d, 1872, and that he did not sell by reason of the injunction order of the United States district court of June 19th, 1872. On the 31st July, 1873, a second execution upon the said judgment, reciting the former suit and the levy and return thereon, was issued to the sheriff of St. Louis county.

On the 3d day of November, 1873, Webster, the present plaintiff, having been appointed assignee in bankruptcy of Powhatan Woolbridge, filed a bill supplemental to the one which had been filed by the Central Bank, setting forth the same facts and others, the object of which was to show that the said judgment of John M. Woolbridge had been procured in fraud of the bankrupt act, and praying that apparent lien of the said judgment and execution be set aside and declared void, and for general relief. Answer and replication were filed, and proofs taken, and on the 17th day of February, 1874, a decree was passed by the district court to the effect that the judgment was valid, but that neither the same nor the execution levied by virtue thereof was a lien upon the real estate in St. Louis county. From this decree John M. Woolbridge appeals. No appeal was taken by the assignee.

Krum & Patrick, for the appellant.

F. N. Judson, for the assignee.

DILLON, *Circuit Judge*.—The decree establishes that the judgment of the appellant against the bankrupt prior to the proceedings in bankruptcy was fairly obtained and is valid.

Webster v. Woolbridge.

The assignee has not appealed, and does not question the correctness of this part of the decree. Tested by the doctrine of the *City Bank of St. Paul v. Wilson*, lately decided by the supreme court of the United States, (17 Wall. 473), this judgment rendered in Pettis county would not, of itself, be a lien upon lands in St. Louis county, but the execution issued upon it became a lien on those lands when the same was levied on them. (Genl. Stats. 1865, p. 648, sec. 23.) This is admitted. The levy was made and the lien by virtue thereof became perfect prior to the commencement of proceedings in bankruptcy against the judgment debtor, and this lien unless it has been lost is protected by the bankrupt act, and is good as against the assignee in bankruptcy.

The assignee in bankruptcy insists that by the laws of the state of Missouri, the lien acquired by the levy ceased in consequence of the failure of the sheriff to sell as required by the statute and the command of the writ, and as he was expressly authorized and ordered to do, by the district court of the United States, on the 29th day of June. On the other hand the judgment creditor maintains that the lien given by the levy still subsists, and that the bankruptcy court ought to have recognized its validity. Unless there is a statute to that effect, a lien acquired by a valid levy during the life-time of the writ subsists, though no sale be made under the writ, and the levy being returned, it may, after the return day, be enforced by a *venditioni exponas*.

And the question here is, whether there is a statute in the state under which the lien of the execution by virtue of the levy has ceased. It will be observed that this is a contest not between two conflicting levies, but between the judgment creditor and the general creditors represented by the assignee in bankruptcy.

It will also be observed that if the sale had been made by the sheriff, and the money brought into court, the decree of

Webster v. Woolbridge.

the court would have given it to the judgment creditor. It was not his fault that he was enjoined. No intervening rights have attached. If he has lost his priority it results from his inaction and from that alone. It will also be observed that the validity of his judgment was all the time being questioned in the district court by the original and supplemental bill, and that when the order dissolving the injunction was made, it was with a view to draw the proceeds of the sale from the state court into the bankruptcy court so as afterwards to determine the rights of the contesting parties thereto. Nothing would have been gained to the estate had the sale been made, and nothing has been lost to it by the omission to make it. Under these circumstances, if the judgment creditor has lost the fruits of his vigilance and benefit of his levy it must be by virtue of a direct and express statute to that effect.

The sections of the statute (Genl. Stats. 1865, p. 646) relied on by the assignee are as follows :

“ SEC. 51. In all cases where an execution is or shall be issued and levied by the proper officers upon real estate, and, for any cause, a sale of such real estate shall not be made at the next term of the court of the county in which such sale is to be made, the execution and lien created thereby shall remain and continue in force until the end of the second term of the court of the county where the land is situated, and until a term of said court is held at which said real estate may be sold according to law.

“ SEC. 52. Where an execution is issued from a court of record in one county, and sent to the sheriff of any other in this state, and the same is levied on real estate and from any cause the circuit court of the last mentioned county shall not be held before the return day of the execution, the sheriff shall retain said execution, and the levy made by virtue thereof shall remain in full force until there shall be

Webster v. Woolbridge.

a term of the circuit court in said last mentioned county at which said real estate may be sold."

These statute provisions will be better understood by referring to the act of March 23d, 1863 (Laws 1863, p. 20), and the decisions of the supreme court of the state construing that act, and by comparing with it the sections above quoted. (*Stewart v. Severance*, 43 Mo. 322; *Wood v. Messerly*, 46 Mo. 255; *Porter v. Mariner*, 50 Mo. 364; *MacDonald v. Gronefeld*, 45 Mo. 28; *Bank v. Bray*, 37 Mo. 194; *Lackey v. Lubke*, 36 Mo. 115.) Upon the exact point now under consideration, in the absence of any opinion of the supreme court of the state to guide me, it is my judgment that sections 51 and 52 do not destroy or put an end to the lien of the levy under the execution issued upon the appellant's judgment.

In Missouri the executions are returnable in term and the law has always required execution sales to be made during a term of the circuit court. (*Bank v. Evans*, 51 Mo. 335; *Id.* 347.) Without a statute an execution is *functus officio* after the return day (*Bray v. Bank*, 37 Mo. 194), but by the statute under consideration, where a levy has been duly made, the power to sell exists after the return day, for the express provision is that if there is a levy when the writ is in force and the sale is not made at the next term, the *execution* and lien created thereby shall remain and continue in force until the end of the second term and until a term of court is held at which the real estate may be sold according to law.

This obviates the necessity of a new writ, and authorizes a sale upon the writ under which the levy was made, at the second term of the proper court, or, if need be, at a still later term. But when a term arrives at which the land levied on may be legally sold, and it is not, then a sale made afterward by virtue of the original execution might be, and probably would be void. Viewed in the light of the act of

Stillwell v. Home Insurance Co.

1863 and its purposes (45 Mo. 30 ; 42 Mo. 332), the statute is entirely consistent with the common law doctrine, that after a levy the writ may be returned on the return day and the levy enforced by a *venditioni exponas*. And such is the opinion of ADAMS, J., in *Porter v. Mariner*, 50 Mo. 364, who, construing the act of 1863, upholds a sale made in 1865, under a new execution, upon a levy made in 1861, says, *arguendo*, that "a *venditioni exponas* might have been issued [in 1865] on this levy [in 1861] without regard to the statute" of 1863. The decree appealed from will be reversed, and the case remanded to the district court.

DECREE ACCORDINGLY.

NOTE.—That assignee in bankruptcy takes, subject to existing legal and equitable rights in third persons, see *Meador v. Everett*, post: *Hamilton v. Lexington, &c. Railroad Co.* post.

STILLWELL, POWELL, & Co. Appellees, v. HOME INSURANCE Co. Appellant.

1. A freight policy insured "the freight of the steamboat Commonwealth, and barge, against total loss of any part of the steamer or barge's freight at and from St Louis to New Orleans," &c. *Held*, that the policy was not limited to the freight list for goods on board at St. Louis when the voyage was begun, but in view of the well known usage of boats in the Mississippi trade to touch at intermediate ports, it covered additions to the cargo received in the usual manner at such ports.
2. Where the barge was sunk on the voyage by one of the perils insured against, and its cargo was transferred to the boat, which had the effect fully to load the boat, and when other cargo to the full capacity of both boat and barge had been actually engaged at intermediate ports for the trip and no other barge could be obtained: *Held*, that the actual loss of the freight, which would have been earned if the barge had not been lost, was covered by the policy.

(Before DILLON, Circuit Judge.)

Marine Policy.—Additions to Cargo.—Damages.—Usage.

Appeal in admiralty. The Insurance Company appeals from a decree of the district court, in admiralty. The facts are these: Libellants made application to respondent for insurance as follows: "Insurance wanted upon freight of steamer Commonwealth, and barge, W. B. Dance, against the total loss of any part of said steamer or barge's freight, at and from St. Louis to New Orleans, with privilege of lighting," &c. This was accepted by the respondent. There was other insurance to the amount of \$3,000—making \$4,000 in all. The boat with the barge in tow commenced the trip with a freight list at starting, as follows: On the boat, \$1,054.71; on the barge, \$2,298.22.

A short distance below St. Louis the barge was sunk by one of the perils of navigation insured against, and its cargo was, thereupon, transferred to the boat.

This transfer had the effect to load the boat to its full capacity in the then low stage of water. The boat had before starting on the voyage from St. Louis engaged cargo at intermediate points on the river, to the full amount which both the boat and barge could carry. In consequence of the disaster to the barge and the transfer of its cargo to the boat the goods which had been engaged could not be taken on, and, with one small exception, were not received or carried. The owners or master could not procure another barge in the place of the one which had sunk. When the barge's cargo was transferred to the boat, the latter, after some delay, owing to overloading in the low stage of water, proceeded to the port of destination and delivered the cargo.

Upon these facts the district court held that the libellants were entitled to recover on the policy. The respondent appeals.

Bakerell, Farish, & Mead, for Insurance Co (appellant).

Rankin & Hayden, for the libellants (appellees).

Stillwell v. Home Insurance Co.

DILLON, *Circuit Judge*. — The action is upon a freight policy, which is a contract by the insurer to indemnify the owners of the vessel against loss by reason of the failure of the vessel to carry freight, in consequence of a peril insured against.

The contract here was for "insurance upon the freight of the steamer and barge, against the total loss of any part of the steamer or barge's freight, at and from St. Louis to New Orleans," &c. The Insurance Company contends that the policy covers only the freight list for the goods on board at St. Louis, when the voyage was begun; and this is really the decisive question in the case.

In construing these brief and informal contracts, the courts must keep in mind the peculiarities of inland river carriage. This was a general cargo, and it is the almost invariable usage of boats in the Mississippi trade to touch at intermediate ports to receive additions to their cargo; and such additions are covered by a contract, such as was made in this instance.

It is contended by the Insurance Company that there was no loss on the freight list because all the cargo on both boat and barge was, after the disaster to the barge, carried by the boat to New Orleans and the freight earned. But the other facts show that there was an actual loss of freight which would have been earned if the barge had not been lost. The loss is not conjectural, but plainly established by the proofs. Goods to the full carrying capacity of both the boat and barge had actually been engaged by the boat for the trip in question, and she was only prevented from carrying them by having received a transfer of the barge's cargo. No other barge could be obtained. It would be an illiberal construction of the contract to hold that it did not cover the goods engaged and the freight which would have been earned thereon but for the loss of the barge by a peril insured against.

AFFIRMED.

In re Sectional Dock Co.

In re SECTIONAL DOCK COMPANY.

An order to show cause upon a creditor's petition to force a co-partnership into bankruptcy in the state of Missouri, may be refused by the district court where it appears on the face of the petition that the estate of the co-partnership debtors is then in actual course of administration by the probate court under provisions of the state statute, in respect to winding up partnership estates where one of the co-partners has deceased.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Missouri Statute as to Partnership Estates.

A creditor's petition in bankruptcy was filed in the district court to put the co-partnership known as the Sectional Dock Company into bankruptcy. Upon the petition the district court refused an order to show cause and the petitioning creditors brought this ruling to this court for review, under the second section of the bankrupt act. The ground of the refusal of the order to show cause was that the petition disclosed on its face that the estate of the co-partnership debtors was in the actual course of administration by the state probate court, under the somewhat unusual provisions of the state statute in respect to winding up partnership estates, where one of the co-partners has deceased (1 Wagner (Mo.) Stats. p. 78, sec. 52, *et seq.*).

In affirming the order of the district court the Circuit Judge orally stated his reasons therefor as given below.

John G. Chandler, for the creditors.

Garesche & Mead, for the administrator.

DILLON, Circuit Judge.—This is a proceeding instituted in the United States district court, upon a petition of Edward Whitaker, to put the Sectional Dock Company into bankruptcy. The Dock Company is a co-partnership, consisting

In re Sectional Dock Co.

of John D. Daggett, Mary Thomas, Sarah Morse, administratrix of the estate of Thomas Morse, deceased, Ann Eliza Hartshorne, and Patrick Rogers. The record also discloses that Mrs. Hartshorne being a married lady, her share was held by John D. Daggett, as her trustee, until recently, when Alexander J. P. Garesche was substituted for him. That Patrick Rogers died in 1870, leaving a will whereby Robert C. Rogers was appointed executor, and administration was had of the estate. The will permitted his interest in the co-partnership to be continued. The record also shows that Robert C. Rogers died June, 1873; that no administration was had here upon the estate of Patrick Rogers, deceased, until June last, when letters, with the will, were granted by the probate court of St. Louis county to Daniel G. Taylor; that the surviving partners, declining to give bond necessary for them to retain possession of the partnership estate, waived in writing their right to do so in favor of Mr. Taylor; that thereupon Mr. Taylor gave the required bond, took possession, and is now administering the estate according to the state law.

The district judge refused the order, and the petitioner, under the second section of the bankrupt act, brings this ruling to this court for review.

The case is anomalous, not only as to the questions involved, but as to the parties constituting the partnership. There is one section in the bankrupt act which relates particularly to the bankruptcy of co-partnerships and corporations—section 36.

“That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the co-partnership, and also all the separate estate of each of the partners, shall be taken, except such parts thereof

In re Sectional Dock Co.

as are hereinbefore excepted, and the creditors of the company and separate creditors of each partner shall be allowed to prove their respective rights, and the assignee shall be chosen by the creditors of the co-partners; and he shall also keep separate accounts of the joint stock or property of the co-partnership, and of the separate estate of each member thereof." Then the statute proceeds to provide for the proving up of claims, and adopts the ordinary equity rule that the firm creditor shall have the first claim on the firm assets, and the surplus is to be appropriated to the individual creditors. So on the other hand the individual creditor is to be paid out of the separate estate, and any surplus may be appropriated to payment of the joint debts.

Now, then, this is a proceeding to throw this co-partnership in bankruptcy and the members of it, whose estate is already in the course of administration in the probate court of St. Louis county under the laws of the state. Before this proceeding was instituted, the probate court of St. Louis county, under the authority of the state statute, had already appointed an administrator, and he has now actual possession of this joint estate. And the statute provides that claims against it shall be established, and that they shall be paid out of the partnership funds to the exclusion of individual debts. It is manifest there cannot be two administrations of the same co-partnership property. The partnership affairs must be wound up and settled in one court or the other. There cannot be two concurrent administrations with any satisfactory result. The record presented to me discloses the fact that all of the firm assets, at all events all within the jurisdiction of the probate court, are actually in the custody of that court and of its officers, and in course of administration. If this co-partnership be adjudged bankrupt, the first thing to be done is to issue a warrant to seize this joint estate and wrest it from the hands of the administrator. And it is

In re Sectional Dock Co.

quite clear to my mind that the only way in which this proceeding can be sustained is to hold that the state statute, so far as it authorizes any administration of the estate of the co-partnership, indeed all that portion of the state statute, is superseded or repealed by the bankrupt act. Otherwise it is a valid statute, and the administrator appointed is lawfully in possession of the estate. And unless the assignee in bankruptcy be entitled to go there and get that estate, he could not make any dividends. There is nothing in his hands to pay the co-partnership debts or to give to the creditors after they come in. The estate is somewhere else.

Now, this does not preclude the right of a creditor, if any one of these co-partners individually be liable to be thrown into bankruptcy, from doing this. Of course, this proceeding, under the state statute, would not preclude it; but, assuming its validity when the probate court has first possession of the estate of the partnership, it only precludes the bankrupt court from going on and taking possession of it. The probate court first obtained jurisdiction, and if the statute is valid, it has the right to continue afterward. It has been suggested, in arguing the question, that, although the court of bankruptcy could not take forcible possession of the property from the probate court, perhaps, it is said, it may be surrendered. But, at all events, that is a step further along in the proceedings, to arise hereafter, and then to be considered, not now, and therefore that the court should have granted the order to show cause. Certainly the district court might have done so, but when it was shown on the very face of the record that this proceeding was instituted after the probate court had acted under the state statute, I think that the district judge was, in his refusal of the application, exercising a sound discretion, seeing that no end was to be gained by granting the order to show cause. I do not see any reason to reverse his order in the premises. His decision is, therefore, affirmed.

AFFIRMED.

Dutcher v. Brooklyn Life Insurance Co.

CLINTON O. DUTCHER AND ANNIE C., his wife, v. BROOKLYN
LIFE INS. CO.

Construing the provision of the policy in suit, in the light of the practical construction put upon similar policies by the company: *Held*, that the plaintiff was entitled, on electing to discontinue the payment of premiums, to a paid-up policy, without first paying a note held by the company for part premiums, but that said note with interest, less the dividends, was to be deducted from the amount insured when the policy became payable.

(Before DILLON and TREAT, JJ.)

Life Policy.—Forfeiture.—Payment of Premiums.—Election to Take Paid-up Policy.—Ambiguity.—Usage.

THIS is a bill in equity against the company to enforce the issue and delivery to the plaintiff of a paid-up policy for \$4,000. On February 29, 1868, the defendant issued its policy to Mrs. Dutcher, in which, for the annual premium of \$615.40, for ten years, the company insured the life of the husband for \$10,000, "with participation in profits." This amount was payable "within sixty days after due notice and proof of death." After the payment of four annual premiums, the plaintiffs (Mr. and Mrs. Dutcher) file the present bill, claiming that they are entitled to a paid-up policy for \$4,000. This is resisted by the company.

The following is a copy of the material portions of the policy: "Non-forfeiture policy. The Brooklyn Life Insurance Company. No. 8718. Amount, \$10,000. Premium, \$615.40. Age, 40. By this policy of assurance, in consideration of the representations and agreements contained in the application therefor, and the sum of six hundred and fifteen dollars and forty cents, to them in hand paid, by Annie C. Dutcher, wife of Clinton O. Dutcher, and of the annual premium of six hundred and fifteen dollars and forty cents, to be paid on or before the twenty-ninth day of February, in each and every year until ten full years

Dutcher v. Brooklyn Life Insurance Co.

premiums shall have been paid, do assure the life of Clinton O. Dutcher in the amount of ten thousand dollars, for the term of his natural life, with participation in profits. And the said Brooklyn Life Insurance Company do hereby promise and agree, to and with the said Annie C. Dutcher, well and truly to pay or cause to be paid the said sum assured, to her; or, in case she shall die before the said Clinton O. Dutcher, to pay the said sum assured to her heirs, etc., or assigns, within sixty days after due notice and proof of the death of said person whose life is hereby insured, the balance of the year's premium, if any, and all indebtedness due or to become due to the company, to be first deducted therefrom.

“ Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by this company, and accepted by the said Annie C. Dutcher, upon these express conditions, that in case the said Annie C. Dutcher shall not pay or cause to be paid the premium as aforesaid, on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due, the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease, and be null, void and of no effect. And it is further understood and agreed by and between the parties hereto, that the dividend of profits which may become payable by virtue of this policy to the holder thereof, shall be applied toward the payment of the note taken for part premiums aforesaid, and that if this policy shall cease or become null or void, the said Annie C. Dutcher, her heirs, executors, administrators or assigns, shall be liable to pay to said company the amount of all notes taken for premium which shall remain unpaid on the note taken for part premium and made payable at twelve months from date, and

Dutcher v. Brooklyn Life Insurance Co.

that the said last mentioned note is to be cancelled by the company on the surrender and cancellation of the said policy, and also that this policy shall not be assigned without the consent of the said company in writing, previously obtained. And it is also further understood and mutually agreed, that in case the said person whose life is hereby insured, shall be or become in any sense an inebriate, the company shall have the right to declare this policy cancelled, and shall be absolved from all liability under it on paying to the holder thereof, or tendering in payment the amount of all unearned premiums, actually received thereon up to the time of such payment or tender of payment. After two annual payments, should the party wish to discontinue (notice to the company being given before the next premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash. In witness whereof, &c., this twenty-ninth day of February, one thousand eight hundred and sixty-eight."

The parties agreed upon the following facts: "That the plaintiff, Annie C. Dutcher, and the defendant contracted and agreed together that the annual premium, \$615.40 due upon said policy, should be payable each year as follows: \$369.24 in money, and \$246.16 in her promissory note, payable twelve months after date, with interest thereon at the rate of seven per centum; that upon the payment of said sum of money and the delivery of said note, the defendant would execute and deliver to said plaintiff, Annie C. Dutcher, a receipt for \$615.40, the premium upon said policy for twelve months, the amount of said note to be a permanent loan from the defendant to Annie C. Dutcher, plaintiff, bearing interest at the rate of seven per centum until paid by dividends, and that at maturity of said note a new note bearing the same interest and covering the amount of said first mentioned note, except as reduced by

Dutcher v. Brooklyn Life Insurance Co.

dividends, and the amount of \$246.40 of premiums for the current year should be given, and so on from year to year.

"That said Annie C. Dutcher, plaintiff, did on the 29th of February, 1868, pay to defendant \$369.24, in money, and \$246.16, in her promissory note, payable twelve months after date and bearing interest at the rate of seven per centum, and in return therefor defendant did deliver to said plaintiff a receipt for \$615.40, the premium due February 28th, 1868, on policy 3718, insuring 10,000 dollars for twelve months ending February 28th, 1869; that said Annie C. Dutcher did, on the 28th day of February, 1869, pay to defendant the like sum of money and the like note increased to the extent of the amount of the preceding note unpaid by dividends, and in return therefor defendant did deliver to said plaintiff a receipt for \$615.40, the premium due February 28th, 1869, on policy 3718, insuring 10,000 dollars for twelve months, ending February 28th, 1870; that the said Annie C. Dutcher, plaintiff, did pay to the defendant the like sum of money and the like note to that last above mentioned, on the 29th day of February, 1870, and also on the 29th day of February, 1871, for the years then next ensuing and defendant in return therefor did deliver at each of said dates to said plaintiff a like receipt to the above; that the delivery of said like sum of money and said like note upon the 28th day of February, 1871, continued said policy 3718 in force until the 29th day of February, 1872. Said receipts were in the form and to the same tenor and effect as the receipt hereto annexed and marked 'A,' and hereby made a part of these agreed facts.

"That, on the 1st day of February, 1872, there was due and owing to defendant by said Annie C. Dutcher, on account of the notes hereinbefore mentioned to have been given by the said Annie C. Dutcher to defendant, the sum of \$793.64. That on the 1st day of February, 1872, the said Annie C. Dutcher notified defendant that she wished

Dutcher v. Brooklyn Life Insurance Co.

to discontinue policy 3718 and desired a paid-up policy therefor, and offered to deliver up to defendant said policy 3718; that defendant refused to accept said policy and deliver to Annie C. Dutcher, plaintiff, a paid-up policy as requested, because the said Annie C. Dutcher refused first to pay defendant said amount of \$798.64 which was then and there a lien against policy 3718. That from the time defendant began business to the 20th day of January, 1871, it was the course of business of defendant to issue paid-up policies to policy holders on demand without deducting the loans of the defendant to the policy holder and to hold the same as a lien against the paid-up policy, but that on and after said date defendant refused to give a paid-up policy to any policy-holder without the payment first of any loans due defendant by such policy holder."

The other necessary facts appear in the opinion of the court.

Krum & Patrick, for the plaintiffs.

Sharp & Broadhead, for the company.

TREAT, J.—This is a bill for specific performance.

On the the 29th of February, 1868, the defendant issued a non-forfeitable policy. The sum insured was \$10,000; annual premium \$615.40; number of premiums to be paid, ten; term, natural life of the insured, "*with participation in the profits.*" Payment of the \$10,000 was to be made within sixty days after death and proof thereof—"the balance of the year's premium, if any, and all indebtedness due, or to become due to the company, to be first deducted therefrom." This seems to contemplate that there would be, or might be, a part of a year's premium and other indebtedness due at the death of the insured.

The policy further provides that "*in case*" "the premium, as aforesaid," shall not be paid "on or before the day here-

Dutcher v. Brooklyn Life Insurance Co.

in mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due," the policy shall become void.

It further provides that "the dividend of profits which may become payable by virtue of this policy to the holder thereof, shall be applied towards the payment of the note taken for part premiums aforesaid, and that if this policy" shall become void, said holder of the policy "shall be liable to pay to said company the amount of all notes taken for premiums, which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and payable at twelve months from date, and that the said last mentioned note is to be cancelled by said company on the surrender and cancellation of said policy."

There is also a clause absolving the company from liability if the insured becomes an inebriate, "*on paying to the holder thereof * * * the amount of all unearned premiums ACTUALLY received thereon up to the time of such payment.*"

The next and last provision is as follows: "After two annual payments, should the party wish to discontinue (notice to the company being given before the next premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid, *in cash.*"

In this case the required notice was given after four payments had been made, and a paid-up policy was demanded for the prescribed four-tenths of the amount insured. The defendant refused the request, unless the plaintiffs would first pay their notes for premiums held by the company; contending that the last clause, cited above, contemplated a previous payment of the annual premiums, *in cash*. The plaintiffs, on the other hand, insist that those notes are mere loans to them, to be paid out of their share of the dividends, should their share equal the amount of said notes, at the

Dutcher v. Brooklyn Life Insurance Co.

death of the assured—said notes being a lien on the policy for the sum finally due thereon—or, if that be not the true construction of the policy, then the defendant should issue a paid-up policy for \$4,000, less the amount of said notes.

The terms of the policy as to notes, quoted above, are not very clear; for they seem to imply in one phrase that many notes for premiums may be outstanding, and in another phrase, that there can be only one outstanding note of the kind, and that for a part of the *last* premium due.

The course of dealing between the parties, however, has put a practical construction on the contract. The receipt for each annual premium paid (as for the last in this case) is as follows: "Received from Clinton O. Dutcher, \$615.40, which continues in force policy 3718, issued by this company, until the 29th day of February, 1872, in accordance with the terms and conditions of said policy.

"Old note returned herewith, the indebtedness being debited against the policy - - - \$547.48
 Amt. of premium loaned this year - 246.16—\$793.64"

The original agreement, it is admitted, was that of the \$615.40 for the annual premium, \$369.24 should be paid in cash, and \$246.16 in a note at twelve months at seven per cent interest, whereupon a receipt for the payment of the whole premium should be given, the amount of said note to be a permanent loan by the company, until paid by dividends, and that at maturity of said note, a new note, at the same rate of interest, should be given, including the \$246.16, and the amount of the former note, less the dividend applicable to its payment. This was the mode pursued each year.

It is further admitted in this case that defendant had always, prior to January 20th, 1871, issued paid-up policies on demand without deducting the loans on outstanding notes, holding such notes as a lien against the paid-up policy; and that since that date the defendant has uniformly

Dutcher v. Brooklyn Life Insurance Co.

refused to issue a paid-up policy unless the holder first paid the outstanding loans or notes.

As there are many like suits pending against this defendant on somewhat similar policies, issued at different times, it may be well to examine them with reference to any changes made by the company in the terms of its subsequent contracts. Thus policy No. 6060, issued March, 1869, is the same as that with reference to which this suit is instituted, except that on the back thereof, in print and writing, the cash-surrender value of the policy is stated for successive years—that value being “exclusive of the value of any dividend, deposits or reversions, which the company will pay in addition;” also that “the above amounts, less any outstanding loans or notes, will be paid on the surrender of this policy, duly receipted, within two months after being forfeited by non-payment of premiums.”

The policies of the defendant were stated from the first to be non-forfeitable; yet they contained clauses of forfeiture. Subsequently, as above, the non-forfeitable provisions were attempted to be defined—that is, a surrender-cash value was stated, if the policy was surrendered within two months after forfeiture. Still, in the body of the policy the forfeiture clause for non-payment of premium and notes when due was retained.

Policy 5638, issued in January, 1869, omits the words “non-forfeiture policy,” and substitutes for the provision above quoted as the last in the policy, No. 3718 (that in question), these words:

“On surrender of this policy, while in force, after the full amount of two or more annual premiums have been paid in cash, *including the payment of any note or notes given on account of premiums*, the company will issue a paid-up policy for the amount of premium paid, less any and all dividends paid on said policy.”

On the back of policy No. 5638 was the same agreement

Dutcher v. Brooklyn Life Insurance Co.

as to cash-surrender value as that endorsed on policy No. 6060. The company had thus added to the new policies, subsequent to plaintiffs', the requirement of previous payment of notes given on account of premiums; indicating, on its part, that there was previous uncertainty on that point.

It thus appears that the policies issued by this company at the commencement were designed to induce the holders to understand that they included several distinct provisions favorable to the insured, viz.:

1st. They were *non forfeitable*. Afterwards they defined, under the head of cash-surrender value, the precise meaning of their non-forfeitable qualities, and limited to two months the condition of non-forfeiture; still retaining on the face of the policy their non-forfeiture designation, and among the conditions, a forfeiture clause. Such seemingly inconsistent and conflicting provisions exact a construction against the company most favorable to the insured.

2d. They gave to the insured *a participation in the profits*. For what period of time? When he was insured for his natural life, would not his participation in the profits continue until his death? It matters not that the annual premiums were to cease at the expiration of ten years, if the insurance was for life. The participation in profits may be in various ways—either by corresponding reduction of premiums, in annual cash dividends, or in additions, with or without accumulations of interest, to the principal sum assured.

3d. The defendant's policies determined the mode of the participation in profits when part payment of annual premium was by note. At the time of the next annual premium, which would be the same time the previous note fell due, there would be credited on the note the dividend of profits to which it was entitled. Then the balance, together with the amount payable by note for the next premium,

Dutcher v. Brooklyn Life Insurance Co.

would be included in the new note, and the former note would be cancelled. In that way there would be only one note outstanding. Such was the practical construction given and assented to; yet serious difficulties might have arisen if a forfeiture had been claimed; for it is provided that the holder, when forfeiture occurs, shall be liable to pay all unpaid notes taken for premiums, "except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date," and said last note is to be surrendered and cancelled on surrender and cancellation of the policy. If that was the only note which could, in the routine of business, be outstanding, and that was to be surrendered and cancelled, for what would the holder be liable? It would seem he would lose only the cash paid on the premiums, and that his notes would be surrendered. But under the clause concerning inebriates, when the company cancels a policy, it must pay back the amount of all unearned premiums *actually* received. What is meant thereby? Actually received only in cash, or both in cash and notes? The main question in dispute here, is, whether the defendant is bound to issue a paid-up policy except when the annual payments are actually paid in *cash*, or the notes given are also first paid in cash. Under the clause concerning inebriates, the company must pay back the amount of unearned premiums *actually received*. How received? In cash merely? Certainly, it cannot be fairly contended that the company would absolve itself under that clause by returning the cash payments and holding the assured liable on his notes for premiums. The payment of premiums includes both cash and notes given. Why, then, should not the phrase in the last clause as to annual premiums, *paid in cash*, receive equally as broad and favorable a construction?

4th. The policies contemplated part payment by note, and indicated how the notes should be treated in connection

Dutcher v. Brooklyn Life Insurance Co.

with the profits, and also how the sum due on said notes should be met when the policy became payable, viz.: that the sum insured should be paid, less the amount due on the notes.

5th. If the ten annual payments had been made, the original policy would have stood as a paid-up policy, and the last note would have been outstanding, payable in twelve months, by its terms, less dividend accrued. Was it contemplated that it should be paid at the end of said twelve months, when it is admitted that the sum named therein was to be a permanent loan at seven per cent, debited against the policy? If so, what was the inducement as to part payment by note, and as to participation in profits to be applied to the payment of the note? How was the participation of profits to be thereafter enjoyed? The theory of the plan proposed and acted on was a receipt for the annual premiums as for cash, while actually cash was to be paid for part, and a note was to be received as cash payment for the balance. Throughout the ten years no actual payment, even of interest on the notes, was expected, but the balance due thereon was carried into a new note. Practically, it seems, the plan offered to the insured was found not to work satisfactorily to the company, and hence it changed not only the phraseology of its later policies but its own interpretation of the earlier policies. It changed the last clause concerning paid-up policies for tenths, as to "annual premiums paid in cash," so that it should read, "including the payment of any note or notes given," etc.

Through all the various provisions concerning the non-forfeiture, cash-surrender, issuing of paid-up policies for tenths, and giving of notes, the way those notes should be treated on cash-surrender, or cancellation in case of inebriates—in short, throughout the various contingencies attempted to be provided for, the notes are treated as sums to be accounted for on the *final* payment of the policies, and

Dutcher v. Brooklyn Life Insurance Co.

not before. It is impossible to reconcile the various provisions with each other, or with the manifest theory on which the earlier policies were based, or with the practical construction given, unless it is held that paid-up policies were to be issued for the tenths named, without the previous payment of the notes, or the deduction of them from the amount of said tenths. If deducted, what was to become of the participation of profits, and what of the interest they bore? The conclusion is, that the plaintiffs are entitled on the facts agreed, to the paid-up policy. The company will hold the notes bearing seven per cent interest, and whatever balance due, less dividends, there may be at the time of the death of the assured, will be deducted from the tenths assured.

The defendant agreed that plaintiffs should participate in the profits during the natural life of the assured; that they should give notes for part of annual premiums; that at the expiration of ten annual premiums the policy should be considered paid up; that the dividends should be applied towards payments of the notes; that the amount payable at the death of the assured should be \$10,000, less the balance due on the final note given as above stated. It could not be determined until the death what would be due on that note for while it bore seven per cent interest annually, it was subject to reduction for dividends. It was uncertain whether the dividends would exceed the interest, or amount to the whole note, principal and interest. Hence, when the paid-up policies for *tenths* was demanded, the plaintiffs were entitled thereto, without previous payment of the notes.

DILLON, *Circuit Judge*.—The policy here in question is dated February 29th, 1868. The payment of the premiums was to be made each year, part in cash and part in a note for the amount of the premium "loaned by the company to the assured," upon interest. After making four annual payments, the plaintiff elected to avail herself of the last provision of the policy, which is in these words: "After two an-

Dutcher v. Brooklyn Life Insurance Co.

nual payments, should the party wish to discontinue, the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash." The company holds the note of the assured, given for previous premiums, less dividends, for \$793.64, drawing seven per cent interest.

The assured now demands a paid-up policy for \$4,000, which the company refuses to issue, unless she will first pay in cash her note for \$793.64, held by the company. The assured concedes, if the company issues the policy for \$4,000, that her outstanding note for \$793.64, with interest to the death of the person whose life is assured, less dividends, is, by the terms of the policy, then to be deducted from the \$4,000.

As shown by my brother, TREAT, the provisions of the policy bearing upon the question now to be decided are far from being harmonious or clear. Under the circumstances, it seems to me that we cannot go far wrong if we hold the company in this case to the same measure of liability that down to January 20, 1871, it voluntarily admitted. It is peculiarly a case, as it seems to me, in which the practical construction put upon the same kind of contract by the company for years should be adopted by the court.

In the agreed statement of facts is the following: "That from the time the defendant began business to the 20th day of January, 1871, it was the course of business of the defendant to issue paid-up policies to policy-holders on demand, without deducting the loans of the defendant to the policy-holder, and to hold the same as a lien against the paid-up policy, but on and after said date the defendant refused to give a paid-up policy to any policy-holder without the payment first of any loans due defendant by such policy-holder." I give to this course of dealing a controlling influence in my judgment, and, accordingly, am of opinion that the plaintiffs are entitled, on the agreed facts, to a paid-

 Dutcher v. Brooklyn Life Insurance Co.

up policy for \$4,000, payable at the time and on the terms specified in the present policy as here expounded.

DECREE ACCORDINGLY.

NOTE.—The following note was prepared by Hon. J. O. Pierce, of Tennessee.

"1. The policy in this case was described as "non-forfeitable," and provided that, on discontinuing the payment of annual premiums, the assured might have in lieu a paid-up policy "for as many tenths of the amount originally insured as there have been annual premiums paid in cash." But it was not contracted in the first instance that the premiums should be paid *wholly in cash*. A note was received for a portion of the annual premium, and the remainder was paid in cash. For these was exchanged a receipt for the annual premium 'as for cash.' Upon this 'theory of the plan,' it is held that the premium was actually paid by the delivery of the note and the cash. This conclusion accords with the following cases: *Hodsdon v. Guardian Life Co.* 97 Mass. 144; *McAlister v. N. E. Mut. Life Co.* 101 Mass. 558; *N. E. Mut. Life Co. v. Hasbrook*, 32 Ind. 447; *Mowry v. Home Ins. Co.* 9 R. I. 346; *Baker v. Union Life Co.* 6 Abb. Pr. (N. S.) 144.

"The court is aided in its conclusions by the practice of the insurer in expounding its own policies of like character for several years. This was clearly proper in view of the vague and inconsistent provisions which the policy bore upon its face. Custom and usage will be resorted to, to explain or construe insurance contracts whose provisions are ambiguous. May on Ins. § 173; Bliss on Life Ins. p. 604; *Coit v. Commercial Ins. Co.* 7 Johns. 885; *Robertson v. French*, 4 East, 185; *Fowler v. Edna Ins. Co.* 7 Wend. 270; *Astor v. Union Ins. Co.* 7 Cow. 202; *Reynolds v. Commerce Ins. Co.* 47 N. Y. 597; *Strohn v. Hartford Ins. Co.* 7 West. Ins. Rev. 452 (Wisconsin, 1874). But not to defeat the essential provisions of the contract, where there is no ambiguity. *Mutual Safety Ins. Co. v. Home*, 2 N. Y. 285; *Stebbins v. Globe Ins. Co.* 2 Hall (N. Y.), 631; *Mut. Ben. Life Co. v. Ruse*, 8 Geo. 534; *Ruse v. Mut. Ben. Life Co.* 23 N. Y. 516; *Howell v. Knickerbocker L. Co.* 44 N. Y. 282; *Hearne v. N. E. Mut. Ins. Co.* 2 Cent. Law Jour. 60 (U. S. Sup. Ct. 1874); *Bushby v. N. Amer. Life Co.* 3 Ins. Law Jour. 701 (Md., 1874); *King v. Enterprise Ins. Co.* (Indiana, 1874) not reported.

"8. The court construes the language of the policy strongly against the insurer, because it is his language, and is intended for his benefit. In this it is in accord with a great weight of authority. *Pelly v. Royal Exchange Co.* 1 Burr. 349; *Outlin v. Springfield Ins. Co.* 1 Sumner, 484; *Breasted v. Farmer's Loan and T. Co.* 8 N. Y. 805; *Westfall v. Hudson R. Ins. Co.* 2

Blair v. Allen.

Duer (N. Y.), 490; *Finckes v. Manchester Life Assn.* 3 Best & S. (Q. B.) 917; *Hoffman v. Aetna Ins. Co.* 32 N. Y. 414; *Western Ins. Co. v. Cropper*, 32 Penn. 351; *Reynolds v. Commerce Ins. Co.* 47 N. Y. 597; *McMaster v. Ins. Co. of N. A.* (N. Y. Ct. Appeals, 1874); *Ooon v. Aetna Ins. Co.*, 4 Ins. Law Jour. 36 (U. S. Ct. Conn., 1874); *James v. Lycoming Ins. Co.* 4 Ins. Law Jour. 21 (U. S. Ct. Mass. 1874).

"4. It is worthy of remark that while this policy was ostensibly non-forfeitable, its sole provision for avoiding a forfeiture was that referred to in note 1, *supra*. But this, according to the construction contended for by the insurer, required the performance, by the assured, of a condition not a part of the original contract, namely, the payment of all premiums to date *wholly in cash*. Grammatically, this construction involved a solecism; in morals, it 'kept the word of promise to the ear' merely. Viewed from a legal stand-point, it is well illustrated by the deductions of the court, in *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 103. 'It is not good policy in the courts to favor such cunningly devised insurance policies, as that, whatever event happens, the underwriters may reap the premium and escape the risk. On the contrary, some degree of acuteness should be called in to uphold and enforce such agreements, whenever there has been a fair contract and a substantial compliance.'

"Chief Justice MARSHALL said, in 1809, 'policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed in order to effect the real intention of the parties, if that intention can be clearly ascertained.' *Yeaton v. Fry*, 5 Cranch, 342. *Cessante ratione legis, cessat ipsa lex*. But whenever their policies assume a form as incongruous as that exhibited in the principal case, insurers may expect the courts to renew their application of Judge MARSHALL's rule."

JOSEPH H. BLAIR, assignee, &c. v. GERARD B. ALLEN.

1. The act of March 3d, 1865 (18 Stats. at Large, 501, sec. 4), as to waiving a jury and trying issues of fact by the court, applies exclusively to the circuit courts. Its provisions do not extend to the district courts.
2. The manner in which the proceedings and judgments of the district courts in actions at law must be revised and re-examined on error in the circuit court.
3. A bank holding an indorsed note may, *it seems*, set off the same against the general deposit account of the maker.

(Before DILLON, Circuit Judge.)

Blair v. Allen.

Act of March 8d, 1865.—Waiver of Jury Trial.—Special Finding of Facts.—Mode of Reviewing Judgments at Law of the District Court.

WRIT OF ERROR to the district court for the eastern district of Missouri.

This was an ordinary action at law by the plaintiff, as assignee in bankruptcy of one Husbands, under section 85 of the bankrupt act, to recover the sum of \$1600, alleged to have been paid to the defendant or for his benefit by the bankrupt in violation of the provisions of that enactment. The substantial allegations of the petition were denied by the answer. In the district court the partner filed a stipulation waiving a jury and consenting to try the cause by the court.

The finding of the court as appears of record was as follows: "The court being fully advised now finds the issues joined herein for the defendant, and orders that judgment in accordance with such finding be now entered herein. It is therefore considered," &c (here follows an ordinary judgment for the defendant).

Afterwards a bill of exceptions was filed, which, after setting out all the evidence, contains the following stipulations: "It is hereby stipulated by the parties that the opinion of the court, TREAT, J. may be read in the circuit court on the hearing of this writ of error to show the finding of facts by the court and its rulings thereon" [which stipulation is signed by the parties], "thereupon" continues the bill of exceptions, "the court took the case under advisement, and on the 8d day of March, 1871, found for the defendant and gave judgment accordingly, to which the plaintiff then and there duly excepted." This is all of the bill of exceptions. The parties have filed in this court as part of the record what they agree to be a copy of the opinion of TREAT, J. which is as follows: "The defendant was accommodation indorser of the bankrupt on a note discounted and held by

Blair v. Allen.

the Mercantile Bank prior to and after the bankruptcy. On the day the note matured the maker informed the indorser that he (the maker) would be unable to pay the whole of the note, but could pay part, and in a short time from collections would pay the balance. He promised out of his funds on deposit with the bank to pay \$1000 on the note that day. The indorser said he would see the officers of the bank and arrange the matter. He did so, waiving notice and protest. The maker went to the bank the same day and paid, by check on his deposit, not \$1000 as agreed, but \$800, which payment was indorsed on the note.

"Subsequently the indorser inquired at the bank if the balance due on the note had been paid, and was informed that only the \$800 had been paid. He then inquired what amount the maker had on deposit, and was informed about \$1100. Thereupon he went to the maker and insisted that out of the amount the latter had on deposit he should apply a further sum toward the payment of the note. The maker said he had been advised that he had done wrong in making any payments as it would work injustice to the indorser and the bank. The indorser said that he, the debtor, had been badly advised, and insisted on his making out of his funds on deposit in the bank, a further payment on the note. The maker then gave his check on his deposit at the bank for \$800, payable to the order of the bank, to be applied to the note, which check the indorser took to the bank and had that sum also credited on the note. It seems that when the first payment on the maturity of the note was made, the accommodation indorser was induced to believe that the maker would, in a short time thereafter, if a little indulgence were granted, be able to pay in full, and as the indorser's ability to pay was unquestioned, the latter was left to arrange with the bank for the indulgence.

In the state of the pleadings, and under the testimony offered, it may be doubtful to what extent the defendant

Blair v. Allen.

was informed and charged with knowledge of the true financial condition of the maker of the note; but supposing he knew that the maker of the note was embarrassed, so that he requested as a merchant indulgence, in order to meet his maturing and matured obligations; that he was actually insolvent and disclosed his condition to his accommodation indorser, a question is presented in this case which differs from any heretofore decided. If a maker of a note has on deposit with the owner and holder thereof a given sum of money, which the latter has a right to retain and apply to the payment of the note, or use by way of set-off, and such application is made by the maker, even at the instance of the accommodation indorser, can the assignee in bankruptcy, if the maker is subsequently adjudicated a bankrupt, receive from the indorser the amount so paid?

The bank holding the past due note with liability of indorser fixed, and at the same time having funds of the maker in their hands would, if it subsequently sued, without bankruptcy intervening, or proved its demand in bankruptcy, be entitled to recover or prove only the balance due it. It would not be bound to sue or prove for the whole amount of the note, to-wit: — \$3000, and give no credit for the \$1600 in its hands. The balance due it would be \$1400, and it could not recover for a larger amount. Should it pay to the maker, no bankruptcy intervening, the \$1600 on deposit, and then insist upon the indorser paying the whole \$3000, what equity would there be in such a transaction in compelling the indorser to pay the entire amount and then turning over to the maker the \$1600 which ought to have been applied to the discharge of the indebtedness? If in such a state of the case, the indorser should be held for only the balance, how does the subsequent intervention of bankruptcy change the legal relations of the parties?

The case of the assignees of *Lugman & Frank v. Thorner* (8 Bank. Reg. 29), is readily distinguishable from that now

Blair v. Allen.

under consideration, even if its ruling be correct. In the case of *Bean v. Laftin* (5 Bank. Reg. 333) different legal views were expressed, but the point now in controversy was *ex industria* left undecided. In the *Traders Bank v. Campbell*, 14 Wall. 87 (see p. 97), the supreme court allude to the point involved in the matter now to be determined. That court says: "It (\$928.38) was received on collections made by the bank from drafts placed by the bankrupts in their hands in the ordinary course of business, and if they had retained them and appropriated it as a set-off against the debt of the bankrupt to them, an interesting question might have arisen as to their right to do so. But instead of doing this, they handed it over to the sheriff, who levied on it as the property of the bankrupt, by virtue of the same execution under which he levied on and sold the goods.

"By the act of the bank it was thus placed in the same category with the goods, and instead of exercising their own right of set-off by directing the sheriff to credit the execution with the sum received by them on the debt, they delivered it to him to be treated as the goods of the bankrupt, and subjected by him to their illegal judgment. This amount then must be treated in the same manner as the other money received by them from the sheriff on the sale of the goods."

That is the question here as to the second payment of \$800 out of funds deposited after the first payment on the note due, and to some extent as to the first payment of \$800 out of deposits on hand at the maturity of the note.

Since the decision in 14 Wall. the supreme court has decided the case of "*Wilson, assignee, v. City Bank of St. Paul.*" The decision in that case calls on the district and circuit courts to review their opinions upon the true construction of sections 35 and 39 of the bankrupt act, where preferences are actually obtained. True, that case does not cover nor necessarily involve the precise question now under review,

Blair v. Allen.

yet it indicates that the presumption on which the district and circuit courts have heretofore acted, as ordinary propositions of law, are not to be followed and applied to alleged preferences under the bankrupt law. In *Bean v. Laflin*, this court expressed its dissent from many rulings had elsewhere, where indorsers were involved, and gave somewhat at length its views upon the subject. It is not to be supposed, as stated in that case, that the ordinary rules of the law merchant were intended to be overthrown by the bankrupt act, but that negotiable paper, instead of losing any of its force connected with banking operations, or otherwise, was to be more strictly upheld.

The relations of maker, indorser, and holder of such paper are well understood. When the position of each is fixed, shall any one of the three parties do an act whereby either of the parties is to be prejudiced? The primary duty is for the maker to pay, and if the holder has funds in his hands applicable to the payment, can he withhold their application after request to apply the same and compel the indorser to pay, what, if the holder had acted as requested, would not have remained unpaid?

Funds in the hands of the holder, belonging to the maker, or coming into his hands while he still holds the negotiable paper unpaid, he is at liberty to apply to the discharge of the paper, or rather ought, as between himself and the indorser, so to apply. In a suit against the holder for the funds deposited with him, he could set off the amount due on the note, and why shall he part with these funds when requested to apply them to the payment of the note, and thus shift the payment to the indorser, regardless of the state of indebtedness between holder and maker? In such cases is not the indorser in the position solely of surety for the balance due, and has he not a right to insist upon such application of funds on deposit as will leave him to pay only the balance due? How otherwise can the equities

Blair v. Allen.

of the bankrupt act and the law merchant as to negotiable paper and of sureties be reconciled ?

In this case, under the facts disclosed, the bank had a legal right to make the application named, at the instance of the maker or indorser, irrespective of the solvency or insolvency of the maker.

As the bank could retain and apply the deposits, and as it did so, whether at the instance of the indorser or not, the note to the extent of such application must be considered as paid and extinguished. In one sense the bank was benefited by the payment, and so was the indorser; but neither the one nor the other was bound to meet more than the balance due, that is to surrender or cause to be surrendered, funds applicable to the particular payment any more than a secured creditor is bound to surrender his collaterals for the benefit of the general creditors.

It is true there is difficulty in any solution of such cases which may be attempted, but that now presented seems to me the only sound one consistent with legal propositions.

J. H. Blair and G. M. Stewart, for the plaintiff.

Krum & Patrick, for the defendant.

DILLON, *Circuit Judge*.—This was an action of law tried by consent by the court upon testimony adduced by both parties, and which is embodied at length in the bill of exceptions. The facts, so far from being admitted by the parties in the court below, were disputed. After the trial was concluded the court rendered a general judgment for defendant, and accompanied it with a written opinion stating therein its view of the facts and the law thereon arising. The parties stipulated in the court below that the written opinion of the judge might be read in this court on the writ of error, to show the finding of facts by the district court and its rulings thereon. This was probably done

Blair v. Allen.

under the supposition that the act of March 3d, 1865 (13 Stats. at Large, 501, sec. 4), applied to the district court as well as to the circuit court of the United States. Such however, is not the case, which, as it is a very useful enactment, is much to be regretted. The purpose and effect of this statute plainly appear in opinions of the supreme court in the cases below cited: *Norris v. Jackson*, 9 Wall. 125; *Insurance Co. v. Tweed*, 7 Wall. 44; *Flanders v. Tweed*, 9 Wall. 425; *Copelin v. Insurance Co. Ib.* 461; *Coddington v. Richardson*, 10 Wall. 516. It follows that rulings and judgments of a district court in actions at law can only be re-examined and revised by the circuit court on error, in the mode which obtained before the statute of March 3, 1865, and that mode is so well settled by the supreme court of the United States, that it is needful only to refer to a few of the numerous cases on this subject. *Guild v. Frontier*, 18 How. 185; *Graham v. Bayne*, *Ib.* 60; *Flanders v. Tweed*, 9 Wall. 425; *Campbell v. Boyreau*, 21 How. 223.

In the case last cited the chief justice states the doctrine of the court and the grounds upon which it rests. He says: "By the established and familiar rules and principles which govern common law proceedings, no question of law can be revised and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment in the case), unless the facts are found by a jury by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict stating the facts and referring the questions of law to the court. The finding of issues of fact upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act unless by virtue of a statute like that of 1865."

As the facts in the present case were controverted, and as no case was stated in the nature of a special verdict for the opinion of the district court as to the law arising thereon, it

Blair v. Allen.

follows that no error of law committed by the district court appears of record. If we could act upon the stipulation of the parties that the facts of the case are stated in the opinion of the district judge (as was done under the statute of 1865 in the *Insurance Co. v. Tweed*, 7 Wall. 44) the judgment below would still have to be affirmed.

There is no distinct finding and no stipulation of the parties that the defendant, when he received the payments or benefit of the payments which are alleged to give him an illegal preference, knew or had reasonable cause to believe that the principal debtor was insolvent and that the payments were made in fraud of the bankrupt act, and without this, an essential element of liability is wanting.

The result is that the judgment must be affirmed without looking into the merits of the case. This is the less to be regretted because taking the facts as stated by the court below in its opinion the bank would have had the right to set off the note against the deposit (bankrupt act, sec. 20; *Alsager v. Currie*, 12 M. & W. 750; *Bailey v. French*, L. R. 7 Queen's B. 34; *Winslow v. Bliss*, 3 Lansing, N. Y. 220; *Ex Smoking Brook Co. v. Moore*, L. R. 6 Exch. 185), and other creditors or the assignee could not have objected. And unless the opinion of the supreme court in the *Traders Bank v. Campbell*, 14 Wall. 87, 97, 98, decides differently, I should have been of the opinion that Husbands' consent to apply the money in the way the law would allow the parties to apply it, and his giving a check to that end, would not be fraudulent within the meaning of the act. Whether the case cited holds otherwise, it is not necessary, nor indeed proper, to inquire.

JUDGMENT AFFIRMED.

Singer v. Sloan.

B. SINGER, assignee of Towle, v. O. C. SLOAN *et al.* appellees.

1. Section 11 of the amendatory bankrupt act of June 22d, 1874, amending section 35 of the original act by inserting "knowing," applies to cases brought after the time when the amendatory act took effect, although the instrument creating the alleged illegal preference was executed before June 22, 1874.
2. The amendment above referred to, made by section 11 of the amendatory act, works a substantial change in section 35, and within the meaning of section 11 of the amendatory act "knowing" and "having reasonable cause to believe" that a fraud on the act was intended, are not legal equivalents.

(Before DILLON, Circuit Judge.)

Amended Bankrupt Act.—Section 35.—“Knowing.”—“Having Reasonable Cause.”

On the 21st day of January, 1874, a petition in bankruptcy was filed against Towle by some of his creditors, and the following 3d of February he was adjudged a bankrupt. The plaintiff, appellant herein, is his assignee. On the 18th day of December, 1873, said Towle and wife executed a deed of trust to secure the defendant, appellee herein, for alleged antecedent indebtedness. The bill was filed December 9th, 1874, to have said deed set aside, as in contravention of the bankrupt act, on the ground that Towle, at the date of the execution and delivery, was insolvent, and that Sloan had reasonable cause to believe, etc. The defendant demurred to the bill, on the ground that it should allege, in conformity with section 11 of the amendatory act of June 22, 1874, that the defendant *knew* that a fraud on the act was intended. The demurrer was sustained, and the bill dismissed. (The opinion of the district judge is published in 2 Central Law Journal, 141.) The complainant appeals against the decree dismissing the bill.

A. Binswanger, for the complainant.

Geo. D. Reynolds, for the defendant.

DILLON, *Circuit Judge*.—This bill was filed after the amendatory bankrupt act of June 22, 1874, went into effect. It seeks to avoid as fraudulent under the bankrupt act, an instrument made by the bankrupt, December 18th, 1873. The question presented by the demurrer to the bill requires a construction of section 11 of the amendatory act. It is contended by the counsel for the assignee: 1. That section 11 does not apply to any transaction which took place before June 22, 1874, but only to transactions subsequent to that time. 2. That, if it does apply in cases brought after June 22, 1874, to transactions before, the insertion of the word "knowing" in section 35 is verbal only, and wrought no change in the legal effect of that section; and hence the bill of complaint was good, although it did not charge that the defendant *knew* a fraud on the act was intended, but only charged that he had reasonable cause so to believe.

However it may be as to cases like the present, brought under section 35, *pending* at the time the amended act of June 22d went into operation, I am very clear in the opinion that the provisions of section 11, amending section 35, apply to all cases of this character commenced after that time, although relating to transactions which occurred before. I do not wish, however, to be understood as conceding that section 11 does not apply to cases pending and undetermined when the amended act went into effect. It is unnecessary to examine that question, and I give no opinion upon it. It is to be borne in mind that this suit is one to enforce a right of action which was wholly given by statute, and to invalidate a security which was good on the general principles of law, and only bad because of an express provision of the statute.

If the change in section 35 made by the new section 11 is *remedial*, then the general rule undoubtedly is as expressed by Mr. Justice MILLER, *In re King*, *ante*, p. 3, that its provisions do apply to pending cases (and *a fortiori* to future

Singer v. Sloan.

cases), unless there is something to show that the legislature intended to exclude them. And even if an action resting upon section 35 be considered a right, as distinguished from a *remedy*, still the general rule is that rights wholly given by a statute are taken away by its unconditional repeal, and particularly as to cases not commenced when the repealing statute took effect (Sedgwick, Const. and St. Law, 129, *et seq.*). There is much in the known history of the amendatory act to fortify the legal presumption above mentioned as to the effect of repealing statutes. The counsel for the assignee makes the further point, that "having reasonable cause to believe" and "knowing" are, in contemplation of law, identical, and the averment of the former is legally equivalent to the averment of the latter. In other words, that congress, by carefully requiring the word "knowing" to be three times inserted in section 35, and by changing section 39 in this respect to conform to the change made in section 35, meant nothing and accomplished nothing. I cannot agree to that view. The intention of congress is to be sought, and this is best done by looking at the original section 35 and the decisions construing it, and then at the amendment made by congress.

The courts had generally, I think I may say universally, held that section 35 was contravened if the creditor or other person had reasonable cause to believe a fraud on the act was intended, although he did not know it, that the inquiry was not what he actually knew, but what he had reasonable ground to believe. Many of the cases on this point are cited in the opinion of the district judge, and I need not refer to them at length.

Now, the main scope of the act of June 22d is to relieve the severe features and rigorous operation of the original act, and the amendment of section 35 was one of the changes of that character. Where reasonable cause to believe that a fraud on the act was intended was before sufficient, *knowl-*

McLean v. Klein.

edge of that fact is now required. A change was made, undoubtedly, but how extensive that change is, or what is necessary to prove the requisite *knowledge* on the part of the defendant, are questions not arising on the record, and not necessary to be determined.

AFFIRMED.

NOTE—See *In re King*, ante, p. 8, and cases cited in note.

J. H. McLEAN v. JACOB KLEIN, assignee in bankruptcy of
Byron A. Baldwin, appellant.

An express provision in a lease by which the lessee gives to the lessor a lien on specified personal property used by the former upon the demised premises, when not in conflict with any statute, is valid against the lessee and his assignee in bankruptcy.

(Before DILLON, Circuit Judge.)

*Bankruptcy. — Landlord's Lien. — How Created. — Validity as
Against the Assignee in Bankruptcy of Lessee.*

APPEAL in bankruptcy. McLean is the assignee of the lessor of certain premises demised to the bankrupt. The district court made an order allowing McLean's demand to the extent of \$660 as a secured claim against the estate of the bankrupt. From this order the assignee in bankruptcy appeals, and makes two questions: 1st. That McLean is entitled to no lien whatever, and is to be ranked as an *unsecured* creditor. 2d. If he is to be treated as a secured creditor, it should have been only to the extent of \$500.

The material facts are these: The lease to the bankrupt was of a hotel, and reserved rent at the rate of \$500 per month, payable monthly, and contained this provision for the security of the lessor: "It is further agreed by the lessee [the bankrupt], that all the furniture, crockery, cut-

McLean v. Klein.

lery, and glass by him owned and used in said hotel shall be subject to the payment of said rent reserved as aforesaid, and all unpaid rent shall be construed to be a mortgage lien on the same after the same becomes due and payable." This lease was recorded long prior to the bankruptcy. The rent was paid to January 14th, 1874; on February 14th, 1874, there was one month's rent due (\$500), which has never been paid. On the 28th of that month the lessee filed his petition to be adjudged a bankrupt, and the rent, at the rate agreed upon, between February 14th and February 28th would be \$160, making in all \$660, the sum allowed by the district court. The furniture, etc., has been sold by order of the court, and yielded more than sufficient to pay the amount of rent due.

Jacob Klein, for the assignee in bankruptcy (appellant).

T. W. Stratton, for the creditor.

DILLON, *Circuit Judge*.—The clause in the lease by which the lessee, in terms, gave to the lessor a lien upon the furniture, etc., in the hotel to secure the rent reserved, was valid between the parties. Although it was declared that "all unpaid rent shall be construed to be a mortgage lien" upon the furniture, etc., yet, technically, it may be conceded there was no mortgage of the property, because no language is used to convey or transfer the *title* thereto.

Admitting that the instrument is inoperative as a legal mortgage, still it is effectual to create an equitable mortgage, or at least a lien in the nature of an equitable mortgage, which does not depend for its validity upon a sale or transfer of the title to the property to which it attaches, and which is good in equity as against the lessee or his assignee in bankruptcy. Whether it could be maintained against an attaching creditor, or a purchaser from the lessee without notice, I need not inquire. In essence, a mortgage is but a

 McLean v. Klein.

lien upon the property mortgaged, and it is evident here that the parties agreed that the landlord should have security for his rent upon certain personal property used upon the demised premises, and to carry that intent into effect they stipulated that all such property should be subject to the payment of the rent which should be construed to be a lien thereon. Such a provision is valid, and contravenes no statute of the state to which I have been referred. Indeed, in many of the states there are statutes giving a landlord just such a lien or right as is here provided for by the agreement of the parties.

The right in the landlord was perfect as against the bankrupt, and the assignee in bankruptcy takes subject thereto. *Abbott v. Godfrey*, 1 Mann. (Mich.) 198; *Holmes v. Hall*, 8 Mich. 66; Hilliard on Mortgages, ch. 22; *Langdell v. Buell*, 9 Wend. 80; *Atwater v. Mower*, 10 Vt. 75. The case of *Dyke & Marr*, 9 Bankr. Reg. 430, cited by the appellant, was probably controlled by the Michigan statute, and it was not intended by the learned judge who decided it to deny the validity of equitable liens on property duly created by the contract of the parties, when such liens are good upon the general principles of the law and do not conflict with any statutory provision. The lien provided for in the case under consideration was broad enough to secure all rent becoming due down to the bankruptcy.

AFFIRMED.

NOTE.—By 12 and 13 Vict. ch. 106, sec. 184, the rights *inter alia* of execution creditors, and of mortgagees, and of persons having a lien upon any part of the property of the bankrupt before the date of the filing of the petition or fiat in bankruptcy, are preserved. The previous statute was 6 Geo. 4, ch. 16, sec. 108.

Decisions as to rights of equitable mortgagees: *Sheppard, ex parte*, 2 Mont. D. & D. 431; *Anderson, ex parte*, 3 De Gex. & S. 600; *Barnett, ex parte*, 1 De Gex. 194; *Ib.* 581; *Heathcote, ex parte*, 2 Mont. D. & D. 711; *Ib.* 587; 3 *Ib.* 129, 458.

In re Buell.

In re AUGUSTUS C. BUELL.

1. *It seems*, that for a libel composed and published in the District of Columbia, the offender may be *there* indicted and punished as for an offense against the laws of the United States.
2. For a criminal offense committed within the District of Columbia, the offender, if found beyond the District, may be removed to the District for trial.
3. Where a district judge is called upon to issue his warrant for the removal of an alleged offender to the district where the offense was committed, he may look into the indictment, and if it is *fatally* defective in essential averments to constitute an offense triable in the district in which the indictment was found, he may refuse to issue such a warrant.
4. The duty of the district judge in such cases considered.
5. The petitioner was indicted in the District of Columbia for the offense of criminal libel, and was discharged on *habeas corpus* in the eastern district of Missouri from commitment under a commissioner's warrant issued in the last named district—the ground of the discharge being that the indictment failed to allege a *publication* of the libel in the District of Columbia.
6. What constitutes a *publication* in the legal sense, within the district, considered.

(Before DILLON, Circuit Judge.)

Removal of Offenders to another District for Trial.—Power and Duty of the District Judge.—Criminal Libel within the District of Columbia.—Publication, what is?

THIS is an appeal by the United States from an order made by the Hon. SAMUEL TREAT, judge of the district court of the United States for the eastern district of Missouri, on the 9th day of March, 1875, in a proceeding by *habeas corpus*, discharging Augustus C. Buell from the custody of the marshal for said district, and refusing, on the motion of the district attorney, to issue a warrant for the removal of the said Buell for trial to the District of Columbia.

The material facts are these: Buell was indicted on the 2d day of July, 1874, in the supreme court of the District of Columbia, for criminal libel on one Zachariah Chandler.

In re Buell.

The indictment charges that Buell, "on the 19th day of February, 1874, in the county of Washington and District of Columbia, of his malice, etc., did compose and write a certain false, etc., libel of and concerning the said Zachariah Chandler, in the form of a newspaper article, printed in a newspaper called and known as the *Detroit Free Press*, printed in the city of Detroit and state of Michigan, as follows" [here setting out the libellous matter in "said newspaper article printed as aforesaid"]; "which said scandalous, etc., libel he, the said Augustus C. Buell, afterwards, to-wit, on the day and year aforesaid, and in the county and district aforesaid, did then and there unlawfully, etc., publish and cause to be published, to the great damage, etc., contrary to the form of the statute," etc., etc.

Buell being found in the eastern district of Missouri, William Patrick, Esq., the United States attorney for the said district, filed an official information, *not under oath*, before Enos Clarke, Esq., a commissioner of the United States for the said district, charging Buell with the above offense, and accompanying the information with an exemplified copy of the indictment; and on March 4, 1875, the commissioner, after a hearing (Buell not having found bail), issued his warrant committing Buell to the "custody of the marshal, to await the action of the judge of the United States district court for the eastern district of Missouri, on his receiving information of said Buell's commitment, that he may be removed from said eastern district of Missouri to said District of Columbia, for trial pursuant to law." Buell sued out a writ of *habeas corpus* from the said district judge, which was served on the marshal, who made return that he held the prisoner by virtue of the said warrant, which, with a copy of the indictment, is made a part of his return. Upon hearing the petition for *habeas corpus*, the district judge made an order discharging Buell from the custody of the marshal and refusing to order his transfer to the District of Columbia

In re Buell.

for trial. The district attorney prayed an appeal to the circuit court (Rev. Stats. sec. 768), which was allowed; and the matter was, after argument, submitted to the court, March 28, 1875. The jurisdiction of the circuit court of the appeal was conceded by counsel.

William Patrick, United States district attorney, for the United States.

James O. Broadhead, for Mr. Buell.

DILLON, *Circuit Judge*. — In the argument before me, the counsel for Mr. Buell has not maintained that the matter charged in the indictment to have been composed and published by him concerning Mr. Chandler is not in its nature libellous, and there is no doubt that it is so. Nor has the counsel for Mr. Buell controverted the position that for a libel *composed and published* in the District of Columbia the offender may be *there* indicted and punished as for an offense against the laws of the United States. And of this opinion was the learned judge of the district court — that opinion resting upon the act of congress of February 27, 1801 (2 Stats. at Large. 103); adopting and continuing in force within the District of Columbia the laws of Maryland; the act of February 25, 1865 (13 Stats. at Large, 439), recognizing libel as an indictable offense against the United States in the District of Columbia, and the decisions of the supreme court of the United States concerning the effect of the above mentioned act of February 27, 1801. (*Rhodes v. Bell*, 2 How. 397; *United States v. Simms*, 1 Cranch, 258; *Stelle v. Carroll*, 12 Peters, 205; *Kendall v. United States*, 12 Peters, 524; *Ex parte Watkins*, 7 Peters, 575.)

By the act of 1801, says Chief Justice TANEY, "the common law in civil and criminal cases, as it existed in Maryland at the date of this act of congress (February 27, 1801), became the law of the District of Columbia on the Maryland

In re Buell.

side of the Potomac." (The Virginia portion was retroceded in 1846 — 9 Stats. at Large, 33.)

It will therefore be assumed that the offense of libel in the District of Columbia is an offense against the United States, for which the offender may be there indicted as at common law, and punished.

This being so, and Mr. Buell having been there indicted for such an offense, one inquiry is, whether there is any law authorizing the removal of persons found beyond the District of Columbia to that district for trial for offenses committed therein. In this respect there is no difference between libel and other offenses, and the question is a general one, whether, for *any* offense committed in the District of Columbia against the laws of the United States, the offender found elsewhere can be removed there for trial. On this point, under the law as it stands, I have no doubt. The authority is ample, and the language of the revised statutes (sec. 1,014), in connection with the act of June 22, 1874, removes the doubts arising on the words "such court of the United States as by *this* act (the judiciary act of 1789) has cognizance of the offense."

The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offenses and escaping or found elsewhere, cannot be taken back there for trial. I agree to the views in general of the district judge on this point, as expressed in his opinion, which accompanied the record in the case, and do not think it necessary to enlarge upon it.

The statute provides that United States commissioners and certain magistrates, "for any crime or offense against the United States," may "arrest and imprison or bail the offender for trial before such court of the United States as by law has cognizance of the offense" (Rev. Stats. sec.

In re Buell.

1,014). An information was filed before commissioner Clarke, who committed the prisoner to the custody of the marshal. In such a case, the further provision is that "where any offender is committed in any district other than that where the offense is to be tried, it shall be the *duty of the judge of the district* where such offender is imprisoned, seasonably to *issue*, and the marshal to execute, a *warrant for his removal to the district where the trial is to be had*" Rev. Stats. sec. 1,014). On the proceedings before him, the district judge refused to issue the warrant of removal and discharged the prisoner; and the question is whether his action in this case ought to be reversed.

The district judge, in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in essential averments to constitute an offense triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge on such an application (*Re Clarke*, 2 Benedict, 540). I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would

In re Buell.

misconceive his duty and fail to protect the liberty of the citizen. It is the constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed, and not elsewhere (article 2, section 2).

In this case the district judge discharged the prisoner on the ground that the indictment failed to show that the alleged libel was published in the District of Columbia, but showed rather that the offense charged therein was an offense, if at all, against the laws of Michigan. If this is a proper view of the indictment, his action was unquestionably proper. The language of the indictment is peculiar. It was only necessary for the pleader to have averred that the defendant did compose and publish the libellous matter, setting it out, within the District of Columbia. Such are the precedents. Why is it alleged, out of the ordinary course, that the libel was composed and written in the form of a newspaper article, and printed in the *Detroit Free Press*, in the state of Michigan, and afterwards, to-wit, on the day and year aforesaid, published in the District of Columbia?

The district attorney, notwithstanding some old English cases, very properly admitted that *publication* by the defendant in the District of Columbia was essential to the offense, and that if this libel was published in Michigan by the procurement of the defendant, he could be there indicted for it. But he contended that if the paper containing the libellous article was afterwards *published* (in the legal sense) by the defendant in the District of Columbia, he could also be there indicted for it as an offense against the United States, and he claimed that, in this aspect of the question, the indictment was sufficient to charge such an offense. Whatever may be the correctness of the contention of counsel in these respects, it seems to me quite doubtful whether the indictment intended to charge a substantive publication by the defendant in the District of Columbia, or any publica-

In re Buell.

tion in that district, except so far as composing a libel there for publication in a newspaper elsewhere is in law a publication in the district. This, without more, would not be a publication in the district. Upon the authorities, it seems clear that if the defendant composed a libel in the District of Columbia with intent to have it published in a newspaper in Michigan, and it was there published by the defendant's procurement or consent, he would be liable to indictment in the latter state (1 Russell on Crimes, 258, and cases cited; 3 Chitty Criminal Law, 872; *Rex v. Johnson*, 7 East, 68; *Commonwealth v. Blanding*, 3 Pick. 304). But the indictment would then be for an offense against the laws of the state of Michigan, and not of the United States. Therefore, the present indictment states facts which show a violation of the laws of Michigan. But it is contended that it also shows an offense against the laws of the United States in the District of Columbia. Merely composing the libel in the district would not be sufficient, as the whole *corpus delicti*, which includes publication in the district, is essential. If it had been intended to charge that the defendant not only wrote the libel in the District of Columbia, but, after its publication in the *Detroit Free Press*, he had also published it in the District of Columbia, in any manner which in law constitutes a publication, the pleader should either have followed the precedents and omitted all reference to the publication in Michigan, or, if he alleged such publication, he should have made a positive and plain allegation of a substantive and distinct publication by the defendant of the libel in the District of Columbia.

As above remarked, the most natural construction of the indictment is that it is framed upon the erroneous legal notion that if a libel is composed within the District of Columbia for publication elsewhere, and it is accordingly published, this, *without more*, is a publication in the district, and makes the offense complete. But suppose that it can be deduced

that the pleader intended to charge a distinct, substantive publication of the libel by the defendant in the District of Columbia, it can hardly be expected that the well-known requirements of *certainly* in the allegations of an indictment can be disregarded, and that the court will supply, by inference and argument, the defects or omissions in the indictment. The most essential ingredient of libel is the *publication*; and the all-essential element of the offense charged in the present indictment is the publication by the *defendant within the District of Columbia*. The uncertainty of the indictment in the latter respect is sufficient to vitiate it. As the grand jury have not plainly said that the defendant published the article in the District of Columbia in addition to the publication in Michigan, the court cannot intend that they meant to say it. It is a fundamental doctrine in English and American law that there can be no constructive offenses; that before a man can be punished his case must be clearly within the law; the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt whether the law embraces the act, or the indictment sufficiently charges the offense, the doubt is to be resolved in favor of the accused (*United States v. Morris*, 14 Pet. 464; *United States v. Willberger*, 5 Wheat. 76).

I have no hesitation in applying these liberal and just principles to the present case, because if libel in the District of Columbia be an indictable offense against the United States, it is an exception, curiously brought about, to the general rule that there are no common law offenses against the general government, and because the defect in the present indictment is not merely formal or technical, but goes to the gist of the offense for which the prisoner is sought to be removed.

The provision (Rev. Stats. sec. 731) that when any offense is commenced in one district and terminated in another, the trial may be had in either, and the offense may be deemed

Hagen v. Kean.

to have been committed in both, although urged by the district attorney, has, in my judgment, no application to this case. The argument is that if the defendant composed the libel in Washington and sent it to Michigan for publication, and it was there published, he may be tried in either place in the courts of the United States. Such an extension of the law of libel can hardly be said to have the sanction of the English courts where prosecutions for libel have been carried very far, and it cannot be very seriously expected that a court in this country will assert any such alarming and dangerous doctrine.

Not to mention other fatal objections to the argument, it is sufficient to advert to the fact that, in the case supposed, there is no law in the state of Michigan, where the offense is said to have been "terminated," making libel an offense against the United States. The order of the district court is affirmed, and the prisoner discharged.

ORDERED ACCORDINGLY.

NOTE.—Subsequent to the foregoing opinion a new indictment against Mr. Buell was found in one of the courts of the District of Columbia, and having been again arrested in St. Louis, he brought another petition for *habeas corpus* before the United States circuit court (TREAT, J.), which discharged him from arrest on the ground that the indictment was found by a grand jury of a court having *no jurisdiction* of the offense.

LOUISA HAGEN v. WM. R. KEAN, *et. al.*

1. An action is given by a statute of Illinois to the "personal representative" of one whose death is caused by the wrongful act of another. HELD: That the words, "personal representative," meant the executor or administrator, and that under the statute the widow, although the deceased died without children and she was the sole beneficiary of the amount receivable, could not sue in her own name.

Hagen v. Kean.

2. Whether such an action can be maintained in another state than the one where the cause of action arose, *quære*?

(Before DILLON and TREAT, JJ.)

Lord Campbell's Act.—*Personal Representative, who?*

DEMURRER to the petition on the ground of the plaintiff's want of capacity to sue.

W. H. H. Russell, for the plaintiff.

Blakeman & Thayer, for the defendant.

DILLON, *Circuit Judge*.—In 1853 the state of Illinois enacted what is known in England as Lord Campbell's Act (9 and 10 Vict. ch. 93). The second section of the Illinois act provides that "every such action shall be brought *by and in the names of the personal representatives of such deceased person*, and the amount recovered shall be for the exclusive benefit of the widow and next of kin" of such deceased person. This action is originally brought in this court by Louisa Hagen, widow of the late Charles E. Hagen, whom the petition states to have been killed in 1870, in the *state of Illinois*, by the wrongful act of the defendants.

The petition states a case within the Illinois act above mentioned. It avers also that the said husband of the plaintiff died without children or next of kin, and that she is his widow and personal representative. It does not aver however, that she has ever taken out letters of administration either in Illinois or Missouri. It does state a case showing that, under the statutes of Illinois, she would as widow be solely entitled to any sum recovered for the wrongful death of her husband.

The right of action in a case of this kind is *created* by statute, and it must be brought by and in the name of the person whom the statute prescribes shall bring it,—that is the "personal representative" of the deceased. And these

Foster v. Lindsay.

words in the statute of Illinois have been authoritatively construed by the supreme court of that state to mean "the executor or administrator." (*Chicago v. Mayor*, 18 Ill. 349; *S. P. Boutiller v. S. P. Milwaukee*, 8 Minn. 97; *Western, &c. R. R. Co. v. Strong*, Sup. Ct. Georgia, 1874. See *Woodward v. Michigan, &c. R. R. Co.* 10 Ohio St. 121; *Whitford v. Panama R. R. Co.* 23 N. Y. 465; *Shearm. & Red. Neg. sec. 290, et seq.*) The plaintiff does not allege nor is it claimed that she is the executor or administrator of her deceased husband, and hence she cannot maintain the action in her own name, even though she is the beneficiary of the sum which the personal representative might recover. Suppose the proper probate court in Illinois should to-morrow appoint an administrator of the plaintiff's deceased husband, and he should bring an action in Illinois, or in this state, if such an action will here lie, is it not clear that the present action could not be pleaded in abatement? If not, then this suit is improperly brought, or the defendant is liable to two separate actions for the same injury, each looking to a full recovery for the damages thereby caused. Whether an administrator appointed in Illinois or in Missouri or in the latter state as auxillary to an administration in the former, could recover in this district by virtue of the Illinois statute, we give no opinion.

TREAT, J., concurs.

DEMURRER SUSTAINED.

ALFRED T. FOSTER v. WM. M. LINDSAY.

Section 4918 of the Revised Statutes of the United States in respect of *interfering patents*, construed, and held to vest the power in the circuit court to adjudge *either* of the interfering patents void in whole or in part, and upon proper issues and proof to authorize a decree that *both* patents are void.

(Before TREAT, J.)

Foster v. Lindsay.

Interfering Patents,—Sec. 4918 of Rev. Stats. Construed.

THE necessary facts are stated in the opinion of the court.

Hatch & Parkinson, for the plaintiff.

G. B. Kellogg, for the defendant.

TREAT, J.—This is a suit in equity under section 4918 of the revised statutes of the United States, concerning alleged interfering patents. The defendant's patent was prior in date to plaintiff's; also the application therefor. The plaintiff claims that the invention was by him; that he had, previous to any knowledge thereof by the defendant, not only invented the patented composition, but actually reduced it to a practical and successful test; that he had shown to the defendant the manufactured article, and when, as their foreman in the brick business, he was consulted thereafter about manufacturing fire-brick by means of which they could obtain a large and profitable order, he called their attention to the fact that he had exhibited to them before entering upon their service, a specimen brick of the needed quality; that thereupon he as their foreman directed various experiments to be made at defendant's brick yard; that when the defendant suggested subsequently that they proposed to obtain a patent for that mode of making an improved fire-brick, he remonstrated against their doing so, claiming that he was the original inventor, and alone entitled to a patent if one was obtainable.

On the other hand, the defendant claims that it was only after a series of experiments under his direction and supervision, in his own establishment, that the success of the mode patented was ascertained.

Without analyzing the testimony with the view of determining whether the plaintiff in his isolated experiment, prior to entering into the service of defendants, had invented the patented mode of securing the desired result, or had

Foster v. Lindsay.

merely experimented so far as to ascertain that the use of sand-rock would furnish the needed glazing in his pottery business, and without enquiring further whether he had not abandoned all purpose of pushing his experiments to ultimate success for fire-bricks, and also without determining to what extent he and the defendant respectively suggested the experiments made in the defendant's establishment which first resulted in an ascertained and definite value from the compound, whereby the rights of the respective parties as employer and employe would arise, we will first consider the true construction of the act of congress. The language of the section is peculiar, and the object designed by it is not free from doubt. The section is as follows :

“ Wherever there are interfering patents, any person interested in any one of them, etc., may have relief against the interfering patentee and all parties interested under him, by suit in equity against the owners of the interfering patent ; and the court, on notice, may adjudge and declare either of the patents void in whole or part, or inoperative or invalid in any particular part of the United States, according to the interest of the parties, etc. But no such judgment or adjudication shall affect the right of any person except the parties to the suit,” etc. (Rev. Stats. sec. 4918.)

So far as known this section has not received any express adjudication. In *Mowry v. Whitney*, 14 Wall. 434, an allusion is made to a somewhat similar provision in the act of 1836. The latter act in the section referred to covered two distinct classes of cases, viz : 1st, where there were interfering patents ; and 2d, where the examiners refused to issue a patent applied for, on the ground of interference with a prior patent. In each of those cases a bill of equity would lie at the instance of either of the parties, and the court could determine in the latter class of cases whether the applicant should have a patent issued to him ; and in the former, might adjudge either of the patents void in whole or in part, etc.

In ordinary cases, where a patentee brings suit for infringement, the defendant can assail the validity of the patent in the manner prescribed; and the decree of the court is binding on the parties. It is contended that, inasmuch as this suit is not for an infringement, the defendant must be confined to the respective merit or claims of the patentees *inter sese*, irrespective of the validity of either. The defendant in this case, among other defences, has set up that the patented compound or process had been anticipated and in use before either of the interfering patents had been claimed or issued. The evidence fully establishes the fact. In a suit for an infringement, a defence for want of novelty would, under the evidence in this case, be successful, whether the one or the other of the interfering patents was the basis of the action. The case of *Mowry v. Whitney* goes no further than to hold that if a patent is to be annulled *ab initio*, the proceeding must be at the direct instance of the government, but it does not decide that the question between conflicting patents may not be fully and finally determined as to the parties to suit for interfering patents.

The plaintiff in this case contends that he has the prior and better right, although his application and patent are of subsequent date, and that the court is bound to adjudicate solely as between his and the interfering patent, leaving one of the patents to stand for subsequent adjudication when assailed in a proper suit.

The act of congress provides for a suit in equity against the owners of the interfering patent for such relief as equity would furnish. If the action stopped there, would a court of equity grant relief to a complainant who had no equity? If it would not, could not the court enquire through proper pleadings and evidence, into the equities of the complainant? But the section proceeds to authorize the court to adjudge *either* of the interfering patents void in whole or part. If it

Foster v. Lindsay.

adjudged the plaintiff's patent void, should not a decree to that effect be entered, instead of a simple decree dismissing his bill? If it ascertains that the defendant's patent is void, and the plaintiff's also, must the decree be restricted to a judgment against the defendant's patent, leaving the plaintiff's patent as if in full force and of established validity; so that if a new suit were brought by the same plaintiff against the same defendant for an infringement of plaintiff's patent, the defendant would then for the first time be able to dispute the validity of plaintiff's patent for want of novelty, etc? Why two suits between the same parties to adjust the controversies between them, when one suit would accomplish the end according to the well-known purposes of equity proceedings? Unless the terms of the statute restrict the court, sitting in equity, so that it can not do full and complete justice between the parties and end the litigation between them, it would seem to be its duty to pass upon the whole controversy when fairly and fully presented. The statute says that the court may adjudge *either* void in whole or part. How can it do so, consistently with law and equity, unless each of the patents is under consideration in all respects? It may conclude that in some respects there is an interference, and in others none, so that the decree would be only for an annulment in part; or it may decree that there is an interference *in toto*, and consequently annul one of the interfering patents, leaving the other to stand as valid. But what would be the position of one who had previously used the patent declared void, when suit was subsequently brought against him by the other patentee for an infringement? Could he assail the validity of the patent which had already, as between the same parties, been adjudged, at least impliedly, to be valid? It seems that the suits in equity authorized in cases of interfering patents should not be restricted to the narrow limits urged. The controversy is between two patentees or those claiming un-

Salamander Company v. Haven.

der them. If neither has a valid patent, the court should adjudge both void, and thus end the strife. It is on this theory that the defendant was permitted to set up in his answer the lack of novelty, not of plaintiff's patent alone, but of his own. True, he might voluntarily have surrendered his patent, and contested the plaintiff's right in a suit for infringement; but why should he not, when sued, insist upon a full defence, whereby a second suit could be avoided? The power vested in the court to adjudge either of the interfering patents void, in whole or part, is held to confer full authority, where the evidence justifies, on issues fairly made, to decree, not one of the patents alone, but both, to be void.

The court so adjudges in this case, and the decree will be accordingly at the costs of the plaintiff.

DECREE ACCORDINGLY.

THE UNITED STATES & FOREIGN SALAMANDER FELTING CO.
et al. v. NATHANIEL A. HAVEN.

1. A composition having been described in a prior patent, one who applies it to a new use can not claim the composition as his invention.
2. The court can not take notice of what was not set up in the answer against plaintiff's patent.
3. The legal rule is that, *prima facie*, a reissue is for the same invention as that originally patented.
4. Section 4916 of the revised statutes of the United States prohibits in a reissue, not only the introduction of new matter, but also the enlargement of the original claim, growing out of the substantial advancement of the art. This rule controls both the patent office and the courts.
5. Every patent as to novelty or utility, depends on the state of the art at the time of the claim made or patent issued.
6. By new matter is not meant merely the introduction of a new ingredient in a patented composition, but any change in the original

Salamander Company v. Haven.

specification and claim whereby a new and substantially different composition and results are secured.

7. Johns' reissue No. 5951, June 30th, 1874, Division D, held to contain new matter and therefore void.

(Before TREAT, J.)

Patent for Inventions. — Reissues. — Enlargement of Original Claim. — New Matter. — New Application of Previously Invented Composition.

THIS was a suit in equity under the 3d and 4th claims of reissue No. 4134, Sept. 27th, 1870, originally granted Bissell, Riley & Frazer, Oct. 5, 1869, for "Improved Composition for Covering Steam Boilers," and under 2d and 3d claims of patent No. 114,711, granted Riley, assignor, 9th May, 1871, for the same subject-matter. Defendant made and sold two compositions, one composed of asbestos, lime putty, and kaolin, the asbestos being purified under Rosenthal's patents, 1872, and one under patent No. 149,689, April 14th, 1874, granted D. U. Snyder, who was Havens's principal, and defended the suit. The "file and contents" of Johns' reissue, No. 5,951, Div. D., put in evidence, show it was at first rejected as containing "new matter," whereupon Johns filed several affidavits under §4916, Revised Stats., which provides that "when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original specification," etc. and the reissue was accordingly allowed.

Saml. S. Boyd, for complainants.

Geo. B. Kellogg and *H. T. Fenton*, for respondents.

TREAT, J.—This is a case in equity for an alleged infringement of several patents of which the Salamander company

is assignee. The reissued patent, No. 4,184, dated Sept. 27th, 1870, is reissue of Oct. 5th, 1869, for a composition or cement composed of lime and putty combined as described, with paper pulp or other suitable fibrous non-conducting material, and with the other ingredients named, or their equivalents, etc., and claims the employment of lime putty, when combined with paper pulp or any other suitable fibrous non-conducting substance, as a material for preventing radiation from heated surfaces, or as an ingredient in any composition used for such purposes.

It is alleged that this patent was anticipated by French's patents, Sept. 14th, 1869, which were for the same purposes, as the foregoing; patent "A" (94,882) was for a composition of crushed asbestos mixed with an *alkaline silicate*, and "B" (94,882) an improvement on "A" by adding to the mixture a vegetable substance, as "saw-dust and other woody matter, to make a lighter and cheaper coating."

The reissue of Johns (No. 5,951) [Div. D], dated June 30, 1874, of original patent, dated April 14, 1868, is of crushed asbestos and lime mixed with water to be applied. The defence is mainly for want of novelty—that the inventions claimed by plaintiffs were anticipated, etc.

Whatever there is in plaintiff's patents for which defendant is to be held as an infringer, consists in lime putty mixed with non-conducting fibrous material. The subsequent patents on which they rest are for lime putty and crushed asbestos.

It seems from the evidence that plaintiffs are assignees of the French patent, *also*, but it is not set up in the bill, though mentioned in the amended answer as anticipating the Bissell & Riley, and also the Riley patents.

While some of the Johns patents are set out, the reissue above is not mentioned in the answer.

It seems, from a cursory examination of the case, that if the Johns reissue (not mentioned in the answer, No. 5,951,

Salamander, Company v. Haven.

of June 30, 1874), relates back to April 14, 1868, the plaintiff's patents as to asbestos and lime putty were anticipated. So if plaintiff claims all non-conducting fibrous substances mixed with lime putty, the claim is too broad.

If each reissue relates to the date of the original patent, then the Johns patent anticipated those held by plaintiff, and although Johns did not specifically state the use for non-radiation, etc., the plaintiff can not, because of the new use to which they apply the composition, claim that they were the first and original inventors of the composition. The court, however, can not take notice of what was not set up against plaintiff's patent.

When this case was before the court previously, it was suggested that if the reissued Johns patent was valid, plaintiff's patents had been anticipated; and the attention of counsel was also called to the fact that the reissues to Johns had not been set up. By agreement of counsel those reissues are now before the court, as if made before his suit was brought, and as if fully set up in the defence.

The only additional point, therefore, is as to the validity of the Johns reissue in question, which is for precisely the same compound as that claimed and used by plaintiff. The legal rule is that *prima facie* a reissue is, for the same invention as that originally patented.

Section 4,916 of the U. S. revised statutes, copied from the act of 1870, prescribes for what, and under what circumstances a reissue may be had.

The repeated decisions by the courts, and especially by the United States supreme court, in the 1st, 17th and 19th Wallace, indicate with sufficient distinctness, that not only no new matter shall be introduced, but that an enlargement of the original claim, growing out of the subsequent advance of the art, is not to be tolerated. The reason of the rule is obvious. Every patent as to novelty or utility depends on the state of the art at the time of the claim made or patent

Brookmire v. Bean.

issued, and, therefore, if a party, after learning from a subsequent advance of the art, the worthlessness of his original invention, is to be permitted to claim a reissue incorporating what was not originally in his mind, and what had been afterwards suggested to him only by advances in the art made by others, then he could, it may be, even without any new invention, override all the elements which would serve to test the validity of the new application. In other words, having procured a worthless patent, and having subsequently learned from the advancing art how, by changing the terms of his patent, it could be made of value, he would, if a reissue, including the new matter, were permitted, have the reissue not only relate back to the date of the original patent, but absorb within its privileges all subsequent matters, wholly unknown to, and unthought of by him, originally.

This rule controls both the patent office and the courts. New matter must not be introduced. By new matter is not meant merely the introduction of a new ingredient in a patented composition, but any change in the original specification and claim whereby a new and substantially different composition and results are secured.

Such is the reissue in question. It is not only for a composition essentially different, but for one not within the purpose for which the original invention was designed.

The plaintiff is entitled to a decree.

DECREE FOR PLAINTIFF.

Brookmire v. Bean.

**BROOKMIRE & RANKIN v. W. C. BEAN, assignee, etc. of
Chas. S. Kintzing.**

A creditor having demanded payment in full in advance as a condition of consenting to sign a composition agreement of the debtor to pay all his creditors seventy cents on the dollar, was held liable to repay the amount to the assignee in bankruptcy (2 Dillon, 108); subsequently, on paying back the amount to such assignee of the debtor, the creditor sought to prove his *original debt* in bankruptcy, the composition having failed: *Held*, under the circumstances, that he was entitled to establish his debt and receive dividends thereon.

(Before DILLON, Circuit Judge).

Composition Agreement. — Right of Creditor who had Stipulated for a Secret Advantage to Prove his Original Debt in Bankruptcy.

APPEAL in bankruptcy from the district court. The firm of Brookmire & Rankin sought in the district court to establish a claim for \$1,436.02 and interest, against the estate of Charles S. Kintzing, bankrupt, for merchandise sold and delivered, and alleging that the note given by Kintzing & Co. for the debt "was cancelled on the theory of its payment, which was an error." The assignee in bankruptcy resisted the claim. The parties stipulated below, "that the question for determination by the district court was whether, upon the facts as found, and the law as declared by the circuit court in the case of *Bean v. Brookmire*, reported 2 Dillon, 108, Brookmire & Rankin have a provable claim against the estate of Kintzing, on account of the note referred to in that case, the decree rendered therein having been satisfied by Brookmire & Rankin." The district court rejected the claim, and Brookmire & Rankin appeal. In this court the appeal was submitted upon the same stipulation. Before the following opinion was pronounced, the appellants, with leave of court, dismissed their appeal, with a view, as stated, to file a bill of review of the decree by which they were com-

Brookmire v. Bean.

pelled to pay to the assignee the amount they had received from the bankrupt (2 Dillon, 108).

G. M. Stewart, for Brookmire & Rankin, appellants.

Edmund T. Allen, for the assignee.

DILLON, *Circuit Judge*.—The controversy between the parties has already, in different forms, been several times before this court (*Bean v. Brookmire*, 1 Dillon, 24; S. C. 1 Dillon, 151; S. C. again, 2 Dillon, 108). In the case first cited, the assignee sued to recover back the \$1,436.02 which had been paid by the bankrupt to Brookmire & Rankin, and this recovery was sought on the ground that the payment was illegal preference under section 35 of the bankrupt act, but as it was paid more than four months before the bankruptcy, it was held that the action was not maintainable. After that decision was made, the assignee brought a bill in equity to recover back this same sum of \$1,436.02, on the ground that it was fraudulently paid by the bankrupt to Brookmire & Rankin (1 Dillon, 151). On the merits, this suit was subsequently decided against Brookmire & Rankin (2 Dillon, 108), and they paid the amount of the decree to the assignee. They now seek to prove the *original indebtedness or cause of action*, and the question is whether, upon the facts found, and the law stated in the case as reported in 2 Dillon, 108, they are entitled to have their claim established, so as to share in the dividends of Kintzing's estate in bankruptcy. The facts as there found need not be here restated at length.

The question presented by this appeal has occasioned me much perplexity. The case is so peculiar as to make it difficult to ascertain the legal principles which should control its decision, and I determine it upon its own circumstances, and agreeably to what seems to me the substantial rights and equities of the parties, without undertaking to announce any rule of general or universal application.

Brookmire v. Bean.

Let us briefly recur to some of its leading features. And first, the original debt of Brookmire & Rankin against the bankrupt is confessedly just. It was for goods sold and delivered. On this debt Brookmire & Rankin have been paid nothing. The amount they received they have been compelled to pay back, on the grounds stated in 2 Dillon, 108. It will be recollected that they had refused to go into the compromise, and had commenced suit against Kintzing in the state court. Laffin, acting for Kintzing, went to Brookmire & Rankin, and representing (according to the weight of the testimony) that the money to pay the note had been raised by himself and Kintzing's friends, or by the latter, paid them the money on their delivering him the note with the indorsement: "We authorize S. H. Laffin to sign for us. Brookmire & Rankin." They entered the note on their books as "sold" to S. H. Laffin. Under the authority thus given, Laffin signed the name of Brookmire & Rankin to the compromise agreement to settle at seventy cents on the dollar. It is stated in the report (2 Dillon, 114), that "the evidence favors the view that the defendants (B. & R.) at first objected to making the indorsement, and finally did it without much reflection, and upon Laffin's assurance that it would be all right, and he would answer that the note should never come back or give them any further trouble. They did not seek Laffin or Kintzing, but were standing aloof from the proposed arrangement for a compromise, and pursuing [by suit in the state court] their own remedy against the debtor." It is further observed (2 Dillon, 114), that "the circumstances of the debtor were such that they could not obtain payment under a judgment against him, which would not be liable to be defeated by the bankrupt act." Tested by the subsequent decision of the supreme court, in *The City Bank v. Wilson*, 17 Wall. 473 (1 Cent. Law Journal, 40), this last observation is erroneous.

The compromise finally miscarried, as all the creditors

Brookmire v. Bean.

did not unite in it, and all the other creditors were, in consequence, remitted to their original position, and to the right to claim one hundred cents on the dollar.

Now, why shall Brookmire & Rankin not be placed upon the same footing with the other creditors? As the compromise failed, there is no outstanding covenant in force against them, whereby they have agreed to take less than the face of their demand or to release it, and this material circumstance distinguishes it from the case of *Mallalieu v. Hodgson*, 16 Ad. & Ell. (N. S.) 689, so strongly relied on by the assignee. There the composition into which the plaintiff had entered, *had been carried out*, and the plaintiff "had received the composition, and yet was seeking to gain a further exclusive advantage to himself and in fraud of the creditors, by suing for the balance of his original debt after allowing for the composition and the value of the [secret] preference" (*Ib.* p. 712); and the court held that his release of the debt, made on entering into the composition, was binding upon him, and an answer to his claim to recover on the original demand. It was this release which defeated the recovery; but in the case before me there is no such release, and the composition fell through because all of the creditors did not come into the arrangement.

It is urged that the debt of Brookmire & Rankin is forfeited by their conduct in authorizing their names to be signed to the composition agreement (2 Dillon, 108). That decision did not go upon the ground that any specific provision of the bankrupt act had been violated, but upon the general ground that Brookmire & Rankin had secured full payment as a condition of signing the composition articles, and had obtained it oppressively, so that the debtor could have recovered back the amount if he had not gone into bankruptcy, and this right devolved upon the assignee by reason of the bankruptcy.

That decision rested largely upon *Atkinson v. Denby*, 6 H.

Brookmire v. Bean.

& N. 778; affirmed, 7 *Ib.* 934. Of course, the act of one creditor stipulating for a secret advantage to himself is a fraud upon the other creditors, but in what manner, in the absence of bankruptcy, these other creditors could have taken advantage of the fraud, and to what extent they could have compelled Brookmire & Rankin to refund on a creditor's bill, are questions by no means easy of solution. The conclusion in 2 Dillon, 108, was supposed to be strengthened by the circumstance that the assignee in bankruptcy represented the rights of the creditors as well as the bankrupt, but the decision essentially rests upon the principle of *Atkinson v. Denby*, and the cases which it follows. In the case last mentioned (*Atkinson v. Denby*), it is to be especially remarked that the composition was paid, and paid to the defendant as well as to the other creditors; and the action was not *to recover the whole amount paid*, but only the £50 paid by the plaintiff in *excess* of the composition, and in excess of what the other creditors received. This is obviously a very different case from the one before the court.

The cases cited by the assignee's counsel, which I will not review in detail, undoubtedly establish this principle, viz: that a "stipulation by a creditor for a secret advantage is altogether void; not only can he take no advantage from it, but is also to lose the benefit of the composition." ERLE, J., 16 Ad. & Ell. 689, *supra*; *Howden v. Haigh*, 11 Ad. & Ell. (O. S.) 1033; *Frost v. Gage*, 1 Allen, 262; S. C. 3 Allen, 560. He loses all rights which depend upon the illegal or fraudulent agreement, and if, in this case, Brookmire & Rankin were seeking to enforce a promise or claim based upon, or arising out of, the composition articles, it would logically result, from the prior decision and the principle of law in relation to composition agreements established by the authorities, that they could not succeed. But such is not their case. The composition failed and was not carried out, and, therefore, never became binding upon any of the

Brookmire v. Bean.

creditors. They were remitted, by reason of such failure, to their former rights; and the present claim is based upon the original consideration, and not upon the composition deed. Unless it is forfeited or barred, it must be allowed.

It is urged, in argument, that to permit Brookmire & Rankin now to prove the claim, is inconsistent with the case in 2 Dillon, 108, in which they were held liable to pay back the money received on this same debt. But not so. To have allowed them to retain the full amount of their debt would have given them an unjust advantage over the other creditors, and as this advantage was unfairly obtained, the court held that they must pay back the money. If the compromise had been carried out, perhaps the court would have limited the recovery to the excess which they received over the other creditors. That suit compelled them to repay the money they had unfairly gained. This put the parties *in statu quo*. The debt of Brookmire & Rankin revived against the bankrupt, and it may be established against his estate. The effect is equitable. It puts all creditors upon an equality. If Brookmire & Rankin had been active in steps to procure full payment, and had positively designed to commit a fraud, I should have felt more reluctance in coming to the conclusion that they should be allowed to establish their debt in bankruptcy. They have done nothing which justly works a forfeiture of their original debt, and if there is any such principle in the law as that fraudulently or illegally entering into a composition agreement works a forfeiture of the original debt, *when the composition fails*, which I very much doubt, I think that the present case is one to which that principle should not be applied.

REVERSED.

NOTE.—The recent amendments to the bankrupt law provide, in a very bungling and cumbersome manner, for the execution of compositions between the bankrupt and his creditors, under the supervision of the bankruptcy court. Hence the obligations of creditors to the debtor, and to each other, which the law itself, independently of the bankrupt

Brookmire v. Bean.

act, imposes upon the parties to a composition, become, at present, of more than speculative importance.

It would seem to a fair-minded man, an exceedingly unfair and improper, not to say dishonest, proceeding, if one among several creditors, all of whom had agreed among themselves and with their debtor, to accept, in view of his misfortunes, a part only of their demands, should secretly, and as a condition of signing the agreement, exact an amount in addition to what he and the others had agreed to take. Such exaction might take from the debtor the little stipend which the other creditors had intended should remain to him for the support of a dependent family, or with which to begin life anew; or, in case the composition were, as usually compositions are, payable in installments, by crippling the present means of the debtor, render it impossible for him to comply with its terms. In either view, the purpose of the honest creditors, who execute and carry out their part of the agreement in good faith, is thwarted. They fail to provide, as they had humanely intended, for the necessities of the debtor; or they fail to secure that portion of their claims which, according to the composition, they were to receive. This result, moreover, is brought about by one who apparently joined with them in the negotiation, and who may ostensibly have been most urgent in his endeavors to relieve the unfortunate debtor. He has solemnly executed the composition agreement with one hand, and held his other in position to receive his *price*.

Viewed in the light of these considerations, one is hardly prepared to be told that frauds in the execution of composition deeds are among the most numerous of any of which we have record in the reports. Creditors are, as a class, men of means, of education, of business habits, and most of them are merchants. It is not creditable to the merchants of Great Britain that for two hundred years past the English reports are replete with decisions touching such frauds. Every lawyer in this country, who has had much experience in such matters, knows that it is a difficult thing to persuade a merchant that it is anything wrong to get all he can out of a debt, whether in fraud of a composition or not. Perhaps it is not too much to say that eight out of every ten compositions with creditors made in this country are affected (and effected) by the fraud of some one or more of the creditors.

It is not the purpose of this note to more than hint at the history of this branch of the law. The cases, if collected, would make a large volume, and a very useful one at this time.

The chancery courts at first undertook to relieve debtors who had been thus oppressed by restraining suits at law against them upon notes or securities given in fraud of compositions, and by decreeing the cancellation of such notes and securities. In reply to the plea that the plaintiff in such equity causes was a *particeps criminis*, and equity should

 Brookmire v. Bean.

not interfere, the courts said that he was *in delicto*, but not *in pari delicto*. Next the court at law allowed the debtor to defend against suits brought by the exacting creditor upon his notes and securities, on the ground that such notes and securities, having been exacted in fraud of a composition, were invalid as against public policy. In the case of *Howden v. Haigh* (3 Perry & Davidson, 661; S. C. 11 Ad. & E. 1038, 1840), where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take the defendant's bills at long dates for their respective debts, stipulated, without their knowledge, for a bill of exchange to be indorsed to him by the defendant for a further sum, it was held that the whole agreement between the plaintiff and defendant was void, as being fraudulent upon the other creditors, and that plaintiff could not recover upon the defendant's bills for the *amount of the composition money*, even although he had received nothing on the bill indorsed to him by the defendant. In brief, the creditor forfeited his entire debt by the fraud, not only that which he stipulated for in fraud of the composition, but that which he stipulated for by its terms. In the case of *Wells v. Girling* (1819, 1 Broderick & Bingham, 447; S. C. 4 Moore, 78), A, a trader, in embarrassed circumstances, being indebted to plaintiff for money lent, and goods, plaintiff promised to induce A's creditors to agree to a composition, on condition of A's giving the plaintiff a promissory note for the money lent, signed by A and another as security; the note was given by A and signed by defendant as security. The plaintiff and A agreed to keep the matter a secret from A's creditors, and plaintiff endeavored, *but in vain*, to accomplish a composition with them: *Held*, that the transaction was void, and the plaintiff could not recover on the note against the defendant. In the report of this case in 4 Moore, 78, DALLAS, C. J., said: "This agreement, therefore, was void in its creation, on the ground of fraud, and if it was void in its inception, it cannot cease to be so on account of events which have happened afterwards. It has, however, been most strenuously objected that the plaintiff is entitled to recover, *as the deed of composition was not carried into effect*. Still, however, the transaction was fraudulent *ab initio*."

The last case was against the security upon the note, but can it be doubted that the same result would have been reached had A, the principal debtor, been the defendant, and is not this an authority for the proposition that a creditor, in committing a fraud upon a proposed composition, forfeits his *entire* demand, even though the composition be not carried into effect?

So again, to like effect, in the matter of *Cross* (4 De Gex. & Smale, 364, 1848), it was held that Gibbons, the creditor who had signed a composition for one-half of his debt, and fraudulently received security for the remainder, forfeited his entire demand, even though he did not get his

 Brookmire v. Bean.

one-half in accordance with the terms of the composition. In this case Mr. Commissioner FANE uses the following language: "The fraud of which Gibbons was guilty, that of drawing in other creditors to submit to a loss of ten shillings in the pound by holding out that he, one of the largest creditors, would submit to a similar loss for the general benefit, and yet secretly stipulating for a payment in full, is a fraud only too common; and it is but just toward the public that those who are guilty of such frauds should, when detected, suffer a loss as great as the unjust gain they sought. If such persons, on being detected, might still rely on the right they stipulated for, they would, in case of non-detection, obtain a great gain, and in case of detection suffer no loss, which would be of evil example. If they could go still further—if, alleging that the debtor was *particeps criminis*, and on that ground insisting that the deed should not operate in his favor, they could fall back on their original demand, the result would be more pernicious still, for it would be to injure all the other creditors, and to make the delinquent's fraud a source of pecuniary advantage to him. In my opinion, Gibbons, in endeavoring to overreach the other creditors, has only overreached himself, for he has ceased to be a creditor of the bankrupt for any sum whatever—he is not a creditor for the £1,600, for he has released that demand; nor is he for the £800, because no right accrues under a fraudulent deed in favor of the fraudulent concoctor."

The consideration thus succinctly stated by Mr. FANE, together with the cases above cited, tend very strongly to uphold the proposition, doubted in the principal case, "that fraudulently or illegally entering into a composition agreement works a forfeiture of the original debt, when the composition fails."

The crafty creditors of England had learned, by an unbroken series of decisions, that notes and securities taken in fraud of compositions could not be enforced except at the will of the debtor, and their next expedient to evade the law was by exacting a cash payment for the additional amount. But the case of *Atkinson v. Denby* (6 H. & N. 778, 1861; S. C. on appeal, 7 H. & N. 935, 1862), determined that money so paid could be recovered by the debtor himself, upon the ground that there is no "difference in principle between the giving a £50 Bank of England note, and a promissory note for £50, payable on demand." As the debtor could resist payment of the promissory note, he ought to be allowed to recover the money.

The following are among the many cases relating to frauds upon composition deeds, and not mentioned above: *Cockshot v. Bennett*, 2 D. & E. 463; *Leicester v. Rose*, 4 East R. 372, 383; *Higgins v. Pitt*, 4 Exch. 322; *Breck v. Cole*, 4 Sand. Sup. Ct. R. 79; *Smith v. Bromley*, Douglas R. 696; *Smith v. Cuff*, 6 M. & S. 160; *Mure v. Sandford*, 1 Giffard, 295; *Clay v. Ray*, 17 Com. Bench (N. S.), 188; *Partridge v. Messer*, 14 Gray, 180; *Case*

In re Lowenstein.

v. Geriah, 15 Pick. 49; *Dougherty v. Savage*, 28 Conn. 146; *Huntington v. Clark*, 39 Conn. 540; *Pinneo v. Higgins*, 12 Abb. Pr. (N. S.) 334; *O'Shea v. Collier White Lead Co.* 42 Mo. 397; *Way v. Langley*, 15 Ohio St. 892; *Horton v. Riley*, 11 M. & W. 492; *Sadler v. Jackson*, 15 Vesey, Jr. 52; *Jackman v. Mitchell*, 18 Vesey, Jr. 581; *Jones v. Barclay*, Douglas, 695, note; *Russell v. Rogers*, 10 Wend. 473, and 15 Wend. 851; *Carroll v. Shields*, 4 E. D. Smith, 406; *Lawrence v. Clark*, 36 N. Y. 129; *Alsager v. Spalding*, 4 Bing. (N. S.) 407; *Wood v. Barker*, 11 Jur. (N. S.) 905; *Payne v. Eden*, 3 N. Y. Term R. 218; *Yeomans v. Chatterton*, 9 Johns. R. 294; *Wiggin v. Bush*, 12 Johns. R. 306; *Tweberry v. Miller*, 19 Johns. 311; *Stock v. Manson*, 6 Vesey, Jr. 300; *Geere v. Mare*, 2 H. & C. 839; *Bean v. Amwinck*, 10 Blatch. 361; *Coleman v. Waller*, 8 Young & Jer. 312; *Turner v. Hoole*, D. & R. N. P. C. 27; S. C., E. C. L. R. 418; *Constantine v. Blacks*, 1 Cox's Chancery Cases, 287; *Amsinck v. Bean*, U. S. Sup. Ct. 1875.

In re LOWENSTEIN.

Under section 29 of the bankrupt act, where the limitation of time operated as a bar to the bankrupt's right to a discharge at and prior to the amendatory act of June 22, 1874, the ninth section of that act does not remove this bar.

(Before DILLON, Circuit Judge.)

Discharge of Bankrupt.—Time of Application.—Sections 29 and 33 of the Bankrupt Act Construed.

LOWENSTEIN, who applied for a discharge in bankruptcy, was, on his own petition, adjudicated a bankrupt April 29, 1872. Debts were proved against his estate, but no assets ever came to the hands of the assignee. His application for a discharge was not made until September 28, 1874. The only reason given for the delay in making the application for the discharge is that the bankrupt has never been able, although he has diligently tried to do so, to procure the assent in writing of a majority in number and value of his creditors, as was required by the law existing up to June 22, 1874.

In re Lowenstein.

On the hearing in the United States district court, Nov. 30, 1874, the bankrupt filed the written assent of more than *one-fourth in number and one-third in value* of the creditors who had proved their claims upon which he was liable as principal debtor, contracted since January 1, 1869. The discharge was opposed by the creditors, and the petition of the bankrupt therefor was denied by the district court, solely on the ground that it was made too late. From the order dismissing the petition for discharge, the defenant brings the case here for review.

N. Myers, for the bankrupt.

J. P. Colby, *contra*.

DILLON, *Circuit Judge*.—Here no assets came to the hands of the assignee, and in such cases the provision of the bankrupt act (section 29) is, that the bankrupt may apply for his discharge "at any time after the expiration of sixty days from the adjudication of bankruptcy, and within one year from such adjudication." Where there are assets, and debts are proved, the application can not be made until after six months; and in such cases there is no provision limiting the application to one year, or any other specified time.

Admitting that, in cases like the present, the delay to apply within the year may be excused (*In re Donaldson*, 2 Dillon, 346; *In re Cannady*, 2 Bissell, 75; *In re Vorbeck*, 1 Pacific Law Rep. 100; *In re Pearson*, 10 Bankruptcy Register, 107), still the excuse here offered is no excuse whatever. The year expired April 26, 1878. The petition for a discharge was not filed until September, 1874. The bankrupt says he did not apply before the act of June 22d went into effect, because a majority of his creditors would not consent to his discharge. This did not prevent filing his petition within the year.

Kennard v. Cass County.

The law reducing the number of creditors whose assent was required, did not pass until January 22, 1874, more than a year after the latest time when the petition should have been filed. Section 9 of this act does apply to ordinary cases, open and pending when it took effect (*In re King*, 1 Central Law Journal, 506, *ante*, p. 8; *In re Griffiths*, 1 Central Law Journal, 507), and if the only obstacle to the discharge here sought was the non-assent of a majority of the creditors, as previously required, the bankrupt would—it may be admitted—be entitled to his discharge on complying with the easier requirements, in this regard, of the amendatory act. But the other obstacle in the way of his discharge is the limitation of time contained in section 29, and this limitation remains in full force, unaffected by the ninth section of the amendatory act of June 22, 1874, which does not undertake to repeal or modify it.

AFFIRMED.

WESTERN DISTRICT OF MISSOURI.

JAMES KENNARD v. CASS COUNTY.

1. The holder of coupons payable to bearer, may sue thereon, without producing or being interested in the bonds to which they were originally attached.
2. Where there is no general authority in a public corporation to make negotiable paper, the special authority should be stated in the declaration, or by alleging the recital of the bond in that respect.
3. In declaring on coupons the instruments in suit should be identified on the face of the declaration by the number of the bond, date, sum and time of payment.

(*Before DILLON and KEEHEL, JJ.*)

Coupons.—How Declared on.—Requisites of Declaration.

On demurrer to the petition. The petition seeks to recover on a large number of coupons. Each count is as follows:

Kennard v. Cass County.

Plaintiff states that the defendant herein, on the 11th day of July, 1870, made its certain instrument in writing commonly called a coupon, herewith filed, whereby defendant promised to pay to the bearer, on the 11th day of January, 1873, at, etc., the sum of \$25, the same being the interest due on the date last aforesaid on a certain bond issued by the defendant, which said bond is therein mentioned. Plaintiff states that he is the owner, holder, and bearer of said coupon; that the defendant has failed to pay said coupon when due, although the same was duly presented for payment on the said 11th day of January, 1873, etc., and payment thereof refused: that said coupon remains due and unpaid, wherefore plaintiff demands judgment against defendant, etc.

The defendant demurs for that—

1. No cause of action is stated.
2. It is not stated that the bonds and coupons were made and issued by the county court of Cass county.
3. It is not stated that they were made in pursuance of any law of the state authorizing their issue; and
4. No facts are stated showing that the county or its officers were authorized to issue said bonds and coupons.

John D. Stephenson and Ewing & Smith, for the plaintiff.

W. P. Hall, Gage & Ladd, and *Robert Adams, jr.*, for the county.

DILLON, *Circuit Judge*.—The holder of coupons like those in suit may sue thereon although he be not the owner of the bonds from which they were detached; and under a declaration, properly framed, may recover without producing or being interested in the bonds. (*Thomson v. Lee County*, 8 Wall. 327; the *City v. Lamson*, 9 Wall. 477; *McCoy v. Washington County*, 7 Am. Law Reg. (O. S.) per Mr. Justice GRIER.)

Kennard v. Cass County.

But where the maker is a county or other corporate body which has no inherent or general power to make such instruments, and can make them only by virtue of special authority, the principles of pleading require that such authority should appear either by distinct averment of the special act conferring it, or by stating the recital of the bond in that respect. The coupons, though detached, are related to the bonds to which they originally belonged, and by way of inducement or recital this relation ought to appear on the face of the declaration or petition. *The City v. Lamson, supra.*

These views are not inconsistent with the case of the *Railroad Company v. Otoe County*, 1 Dillon C. C. 888, which was, in some respects, peculiar, and where it was insisted that the pleader should state the *facts* showing that the county officers had the authority to issue the bonds, that is, should allege the election or other facts showing compliance with the preliminary steps on which the issue of the bonds was authorized; but this was held not to be necessary.

Experience in other states has shown that it is also well that the coupons should be identified by the number of the bonds as well as by the date, amount, time of payment, etc., of the coupons themselves, as thereby the danger of the same instrument being more than once put in suit is much diminished.

For the reason that the authority of the county of Cass to issue the coupons ought to appear in the manner above stated, the demurrer is sustained, but the plaintiff may amend.

KREKEL, J. concurs.

JUDGMENT ACCORDINGLY.

NOTE.—The principle of the above decision re-affirmed by Mr. Justice MILLER in *Thayer v. Montgomery County*, *post*.

 Harshman v. Bates County.

Mode of declaring on coupons. *Ring v. Johnson County*, 6 Iowa 265; *Wiley v. Board*, etc., 11 Minn. 371; *Thomson v. Lee County*, 3 Wall. 327; *The City v. Lamson*, 9 Wall. 477; *McCoy v. Washington County*, 7 Am. Law Reg. (O. S.) 193.

Limitation of actions on coupons: *The City v. Lamson*, 9 Wall. 478; *Lexington v. Butler*, 14 Wall. 282, S. C. 3 Wallace, jr. 381; *Clark v. Iowa City*, U. S. supreme court, 1874.

Coupons draw interest from the time they become due and payable. *Aurora v. West*, 7 Wall. 105; *Gelpcke v. Dubuque*, 1 Wall. 206; *Burroughs v. Richmond County*, 65 North Car. 234.

Relation of detached coupons to the bonds from which they were detached. See *Clark v. Iowa City*, U. S. supreme court, February, 1874.

 G. W. HARSHMAN vs. BATES COUNTY.

The constitution of Missouri (art. 11, sec. 14) requires a two-thirds vote to authorize municipal subscriptions to the stock of a railroad corporation: A township voted stock in company A, which afterwards, under a general law of the state, consolidated with company B, and formed thereby a new company, C: Held, that a subsequent subscription by the township to company C, by virtue of the prior vote to company A, was unauthorized, and bonds which on their face recited these facts, were void, even in the hands of a *bona fide* holder for value.

(Before DILLON and KREKEL, JJ.)

*Municipal Bonds.—Constitution of Missouri.—Precedent Vote
—Effect of Consolidation on Previous Vote.*

THIS is an action against the county of Bates on a large number of coupons originally attached to bonds issued by the county court of the above named county.

The following is a copy of one of the bonds and coupons as set out in the petition:

(FORM OF THE BOND.)

“No. '46. United States of America. \$1,000. State of Missouri, county of Bates. Issued pursuant to ar-

Harshman v. Bates County.

ticles of consolidation in payment of stock due the Lexington, Lake, & Gulf Railroad Company, consolidated Oct. 4th, A. D. 1870.

“Know all men by these presents, that the county of Bates, in the state of Missouri, acknowledges itself indebted and firmly bound to the *Lexington, Lake, & Gulf Railroad Company*, in the sum of one thousand dollars, which sum the said county of Bates, for and in behalf of Mount Pleasant township therein, promises to pay to the said Lexington, Lake, & Gulf Railroad Company or bearer, at the Bank of America, in the city and state of New York, on the 18th day of January, A. D. 1886, together with interest thereon, from the 18th day of January, A. D. 1871, at the rate of ten per cent per annum, which interest shall be payable annually on the presentation and delivery at the said Bank of America, of the coupons hereto attached.

“This bond being issued under and pursuant to an order of the county court of Bates county, by virtue of an act of the general assembly of the state of Missouri, approved March 23d, 1868, entitled, ‘An act to facilitate the construction of railroads in the state of Missouri,’ and authorized by a vote of the people, taken May 3d, 1870, as required by law, upon the proposition to subscribe ninety thousand dollars to the capital stock of the Lexington, *Chillicothe*, & Gulf Railroad Company, and which said railroad company last aforesaid, and the former Pleasant Hill division of the Lexington, Chillicothe, & Gulf Railroad Company were on the 4th day of October, 1870, consolidated, as required by law, into one company, under the name of the Lexington, Lake, & Gulf Railroad Company. And which said last named railroad company, as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, subscriptions, bonds, moneys, and properties, whatever, of the two said several companies forming said consolidation, or either one of them.

Harshman v. Bates County.

"In testimony whereof, the said county of Bates has executed this bond by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and by the clerk of said court, under the order thereof attesting the same and affixing the seal of said court. This done at the city of Butler, county of Bates, this eighteenth day of January, A. D. 1871.

"Attest: W. J. Smith, clerk of the county court of Bates county, Mo. B. H. Thornton, presiding justice, of the county court of Bates county, Mo. County court of Bates county, Mo. Seal."

The following is the form of the coupons:

"\$100. Butler, Bates county, Mo. January 18th, A. D. 1871. The county of Bates acknowledges to owe the sum of one hundred dollars, payable to bearer on the 18th day of January, 1878, at the Bank of America, in the city and state of New York, for one-year's interest on bond No.—. W. J. Smith, clerk county court, Bates county, Mo."

The plaintiff in his petition alleged that on the 18th day of January, 1871, the defendant issued its several bonds set set out in the several counts of the petition (to recover the amount evidenced by coupons on which the suit was brought), by which it bound itself to pay to the *Lexington, Lake, & Gulf Railroad Company* and for and on behalf of Mount Pleasant township, in said county, one thousand dollars, which it promised to pay to said company at the Bank of America, etc.

It alleges that prior to the 5th day of *April*, 1870, certain tax-payers of Mount Pleasant township petitioned the county court of Bates county, setting forth their desire to subscribe \$90,000 to the stock of the *Lexington, Chillicothe, & Gulf Railroad Company*, and thereupon the court ordered an election in the said township for May 8d, 1870, which was held, and two-thirds of the qualified voters of the said township voting thereat voted for it.

Harshman v. Bates County.

It further alleged that on the 14th of *July*, 1870, another corporation was formed by the name of the Pleasant Hill division of the Lexington, Chillicothe, & Gulf Railroad Company, and that these two corporations, one being the Lexington, Chillicothe, & Gulf Railroad Company, and the other being the Pleasant Hill division of the Lexington, Chillicothe, & Gulf Railroad Company, were on the 4th day of October, 1870, consolidated under the name of the Lexington, Lake, & Gulf Railroad Company.

That thereafter, to-wit: on the 18th day of January, 1871, the county court of Bates county, "in pursuance of the authority conferred upon it by the said vote of the people of said township, subscribed the said sum of \$90,000 in behalf of said township to said Lexington, Lake, & Gulf Railroad Company (the consolidated railroad company); and that said bonds (to which the coupons in suit were annexed) were, among others, issued by said court in payment of said subscription."

Plaintiff in his petition also states that said Lexington, Chillicothe, & Gulf Railroad Company was by the terms of its charter to commence at the city of Lexington, in Lafayette county, Missouri, and thence to run southwardly from said city to Holden, on the Pacific Railroad; in Johnson county; thence southwardly through said county of Johnson and the county of Cass, in the direction of Butler, in Bates county, and thence southwardly to such point in said county as might be found most advantageous to connect said railroad with Fort Scott, Kansas; and that said Lexington, Lake, & Gulf Railroad Company was, by the terms of consolidation, agreed upon between said Lexington, Chillicothe, & Gulf Railroad Company and said Pleasant Hill division of said Lexington, Chillicothe, & Gulf Railroad Company, to commence at said city of Lexington, and to run thence southwardly along the original route of said Lexington, Chillicothe, & Gulf Railroad to the southern

Harshman v. Bates County.

boundary of Lafayette county, and thence south-westwardly through Jackson county to the city of Pleasant Hill, on the Pacific Railroad, in Cass county; thence southwardly through said Cass county to the south line of said county, where it was to intersect the original route of the said Lexington, Chillicothe, & Gulf Railroad Company; and from such point of intersection to such point in said Bates county as should be required to enable said consolidated company to demand, receive and avail itself of the subscriptions voted it by Mount Pleasant township as aforesaid, and by the township of Grand River, in said county, or either of them; thence to such point in or through Bates county as might be found most advantageous to connect with railroads, constructed or to be constructed in the state of Kansas, or to extend southward through such counties in Missouri as might be most advantageous to connect or consolidate with railroads leading to the states of Arkansas or Texas, or to the Gulf of Mexico. Plaintiffs state that the amount of capital stock of said Lexington, Chillicothe, & Gulf Railroad was fixed by its charter at two million dollars, and that the capital stock of said consolidated road was also fixed by said articles of consolidation at two million dollars, and that the duration of each of said corporations was fixed at one hundred years. Plaintiffs state that said town of Butler is in or about the center of said Mt. Pleasant township, in Bates county; and that said consolidated road is now located, graded and bridged from the said city of Lexington along the route of said consolidated road, as above described, to said town of Butler, and for several miles southward of said town; that southward of said town, so far as built, it pursues the same general direction as the proposed line of said Lexington, Chillicothe, & Gulf Railroad, as above described; and that northward thereof it pursues identically the same line in the counties of Bates and Lafayette, and that the greatest divergence between said two lines at any

Harshman v. Bates County.

point is fifteen miles, and that the the distance between said town of Butler and said city of Lexington is eighty-three miles.

The plaintiff alleges that he became a holder of the coupons in suit before maturity and for value, and asks judgment for the amount thereof.

The defendant demurs to the petition on the ground that it shows that the county court had no authority in law to make the subscription recited in the bonds or to issue the bonds in payment therefor, and because it also shows that the question of making the subscription to the new or consolidated company was never submitted to a vote of the people of Mount Pleasant township, nor assented to by them as required by the constitution and laws of the state.

T. K. Skinker, for the plaintiff.

Glover & Shepley, and *C. C. Bassett*, for the county.

DILLON, *Circuit Judge*.—The following facts are recited in the bonds (the coupons on which are in suit), and alleged in the petition :

1. That the bonds were "issued pursuant to articles of consolidation in payment of stock due the Lexington, Lake, & Gulf Railroad Company, consolidated October 4, 1870."

2. That they were issued by the county "for and in behalf of Mt. Pleasant township," under the act of March 28d, 1868, known as the *township* railroad aid law. (Laws of 1868, p. 93; 1 Wagner's stats. p. 313.)

3. That the proposition submitted on the 3d day of May, 1870, to the voters of the township, and by the requisite majority then assented to, was whether they would authorize the county court to "subscribe \$90,000 to the capital stock of the Lexington, Chillicothe & Gulf Railroad Company."

Harshman v. Bates County.

4. That afterwards, July 18th, 1870, another corporation was newly formed under the laws of the state, namely, the *Pleasant Hill division* of the Lexington, Chillicothe & Gulf Railroad Company, and that afterwards, October 4th, 1870, under the act of March 24th, 1870, these two companies (as recited in the bond) were "consolidated as required by law, under the name of the Lexington, Lake & Gulf Railroad," [the payee of said bond] — "which last named company," the bond continues, "as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, subscriptions, bonds, moneys and properties whatever of the two said several companies forming said consolidation, or either of them."

5. That afterwards, *January 18th*, 1871, the county court, claiming to be authorized thereto by the above mentioned vote of May 3d, 1870, in Mt. Pleasant township, and reciting this vote in the bonds, as its source of power, made the subscription, not to the company to which it had been voted, but to a new company, into which that company had, *after the vote, but previous to the subscription*, been merged or consolidated under the laws of the state.

Upon these facts, all of which appear on the face of the petition, and, substantially, all of them, on the face of the bonds in suit, the question is, whether the bonds are valid and binding obligations in the hands of a *bona fide* holder? This case contains an element not in the Cass county township bond cases decided at this term on demurrer, growing out of the fact that here the subscription was made after the vote was taken, to a new or consolidated company. (*Jordan v. Cass County.*)

The case also differs, as I think, from other cases in this court, and from cases decided by the supreme court of the United States, in the circumstance that all of the facts relied on as showing the want of power to issue the bonds,

Harshman v. Bates County.

are recited in the bonds themselves; and clearly, as it seems to me, it must be true that the holder of these bonds is chargeable with actual notice of the *facts* therein stated concerning them; and if such facts show that in point of law the county court had no power to make the bonds, the holder is conclusively presumed to have knowledge of such want of authority. If the facts stated in the bonds, and averred in the petition, show that there was no power to issue the bonds, and if the plaintiff is affected with notice of these facts, and of their legal consequences, we have no question here as to the rights of an innocent holder for value; for the case is the same as if the action were by the railroad company to which the subscription was made and the bonds delivered.

The case differs also from those in which the subscription was made by the county court without a vote of the people, under authority to do so, contained in special charters granted prior to the adoption of the constitution, as in *Nicolay v. St. Clair County*, decided at this term.

The provisions of the constitution, and the general law of the state in pursuance of it, apply to this subscription; so that, as between the county or the people of the township, on the one hand, and the railroad company, or any holder of the bonds with actual notice, on the other, an assent of two-thirds of the qualified voters of the township to the making of the subscription is an indispensable prerequisite to its lawfulness, and to the validity of the bonds issued in payment therefor.

The constitution of Missouri, of 1865, contains the following: "The general assembly shall not authorize any *county, city or town* to become a stock-holder in or loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall consent thereto." (Art. XI. sec. 14.)

Harshman v. Bates County.

And this requirement of a two-thirds vote as a condition of the right of any county, city or town, to take stock in or loan credit to any railroad company, is also made in the enactments of the legislature passed in pursuance of the above mentioned provision of the constitution. (Wagner's stats. 305, secs. 17, 18.) And such a precedent vote is also required in the township railroad aid act of March 23d, 1868, under which the vote was taken and the bonds now before the court were issued. (*Jordan v. Cass County*, at this term.)

Accordingly, the question was submitted to the voters of Mt. Pleasant township, on the third day of May, 1870, whether they would subscribe \$90,000 to the Lexington, Chillicothe, & Gulf Railroad Company; and the requisite two-thirds of those voting at the election voted therefor.

But before any subscription was made, or bonds issued, or steps taken to carry out this vote, the company in whose favor the aid was voted consolidated with a distinct corporation not in existence when the election was held, and the two (as recited in the bond) were merged "into one company, under the name of the Lexington, Lake & Gulf Railroad Company;" to which, in January following, the subscription, under the vote of the previous May, was made, and the bonds in suit issued.

The consolidation was made under the act of March 24th, 1870, which authorizes a majority in interest of "any two or more railroad companies in the state * * to consolidate in the whole or in the main, and form one company, owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the liabilities and obligations to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation." (Wagner's stats. p. 314, sec. 56.) So that, upon the face of the act, it appears that upon the consolidation being effected in pursuance of its provis-

Harshman v. Bates County.

ions, the old corporations are merged in the new, which, however, succeeds to all the rights, powers, privileges and immunities, and is subject to all the liabilities and obligations, of both the companies making the consolidation. And such would appear to be the effect of the consolidation, were there no statute provisions upon the subject. (*Clearwater v. Meredith*, 1 Wall. 40; *McMahon v. Morrison*, 16 Ind. 172; *Tomlinson v. Branch*, 15 Wall. 465.)

Under the legislation of the state, when two companies consolidate and form one, the stock is changed, and the former companies become extinct, and the line of the road is changed as may be provided in the articles of consolidation. In the case before the court, the nature of the changes in the line of the road of the consolidated company is set forth in the petition. And it seems to me to be perfectly clear, upon well-settled principles of law, that a subscriber to the stock of Company A, after it has consolidated with Company B, and formed Company C, can not be compelled by the latter company to pay the subscription; and the plain reason is that such was not his contract. Such a change is structural and organic, and is not binding upon a non-assenting subscriber or stockholder, unless the right to make it is given by statute, or was reserved at the time the corporation was created, or the contract of subscription made.

In support of these views, the case of *Clearwater v. Meredith*, *supra*, decided by the supreme court of the United States, is a direct authority; and if it can not be reconciled with the majority opinion in the *Pacific Railroad Company v. Hughes* (22 Mo. 291), it would not be difficult, perhaps, to show that the views of the supreme court of the United States, aside from their authoritative force in this court, are most consonant with principle, and with adjudications elsewhere. It follows that if the subscription which Mt. Pleasant township authorized by its vote had actually been made, it could not have been enforced by the new company; if

Harshman v. Bates County.

made by the county court to the new company, it would be without authority, and bonds issued therefor would be both unauthorized and without consideration, and could not, therefore, be enforced by the new company, or by any holder with notice of the facts, unless by virtue of the act of March 24, 1870.

But the case in hand is one where *no* subscription was ever made to the company to which it was voted; and it might be conceded that if it had been actually made, the right to it would pass by operation of the statute to the new company, without the concession involving the consequence of a liability upon a subscription made for the first time after the new corporation was formed.

The opposite view would nullify the constitutional provision, by defeating the purpose it was designed to accomplish. The theory of the constitution and the acts of the legislature passed in pursuance of it, is, that no stock in a railroad company shall be taken by the public corporations or municipalities of the state, unless two-thirds of the voters sustain it; and it is necessarily implied that the company whose stock is to be taken and paid for in bonds must be specified and known. Is it possible that when the people vote that they will take stock in a particular company, which is named, this will authorize the county court to make the subscription to another corporation? The frauds which such a doctrine would produce, and the injustice which would result from it, may be readily foreseen, and need not be portrayed. By such a construction the constitutional provision, which was conceived in the highest wisdom, and was intended to remedy for the future a mischief then already beginning to be felt, would be deprived of effective operation, and rendered of little or no value. The principle, where the law requires a precedent vote, and the vote is in favor of the municipal or public corporation subscribing to the stock of a particular company, that a subscription to the vote of another and distinct corporation is unauthor-

Harshman v. Bates County.

ized and not binding, was decided by the supreme court of the United States in the case of *Marsh v. Fulton County*, 10 Wall. 676, and that, too, in a case where the face of the bonds did not so fully as in the case at bar display the history of their issue, and of the subscription in which they originated.

In my judgment, under the principles established by the cases of *Clearwater v. Meredith*, and *Marsh v. Fulton County*, above mentioned, the county court of Bates county had no power to make the subscription recited in the bonds here in question, or to issue the bonds; and I consider this view to be consistent with the many cases in which that court has decided, in substance, that nothing but a want of power to issue such securities can avail against a holder for value, without actual notice of the equities set up by the way of defense.

I might dwell upon the fact that the statute in relation to the consolidation was, as in the case of *Clearwater v. Meredith*, permissive and not mandatory upon the companies; and point out the hardship of holding the township or its people bound by a subscription to a consolidated company, when they had never authorized such a subscription, nor ever had an opportunity to vote against or oppose the consolidation; but it is scarcely necessary to do so.

As the facts which in law show the bonds to have been issued without authority appear on their face, and are alleged in the petition, it is my judgment that the plaintiff can not recover thereon; and accordingly, the demurrer to the petition will be sustained.

JUDGMENT ACCORDINGLY.

KREKEL, J., dissented.

Thereupon the circuit judge announced the following points of disagreement between himself and the district judge:

Harshman v. Bates County.

The judges of the court were opposed in opinion upon the question whether the petition set forth a legal cause of action against the defendant.

Also, upon the question whether the demurrer to the petition ought to be sustained.

Also, upon the question whether the county court had authority, under the constitution and laws of the state of Missouri, to subscribe to the stock of the consolidated company, under the vote of the 3d of May, 1870, in favor of one of the companies, which, after the vote, but before the subscription, consolidated with another company, forming thereby the company to which the subscription was made and the bonds issued.

Also, upon the question whether the recitals in the bonds affected the plaintiff with notice of facts which defeat his right to recover thereon.

NOTE.—The foregoing decision was made before the judgment of the supreme court in *Nugent v. The Supervisors of Putnam Co.*, 15 Wall. 241.

That case differs from the one above reported, in this: *There* the subscription to one of the constituent companies was *before* the consolidation, *here* it was *afterwards*. In this case there was nothing but a bare vote before the consolidation and that, without more, creates no contract between the municipality and the railroad company. This is clear in principle and is settled law. *Aspinwall v. County of Jo Daviess*, 22 How. 364; *Dillon's Munic. Corp. sec. 42*. Under the constitutional provision requiring a vote of the people before any municipality shall "become a stockholder in or loan its credit to *any* company," I still think that the subscription, or agreement to subscribe, must be to *the* company in whose favor the vote was taken, and that this *vote* cannot be carried over to the consolidated company and the subscription made to it. Whether this view is reconcilable with the opinion of the supreme court in the *Nugent* case, remains yet to be decided. I think the cases can be and ought to be distinguished, and after reading the foregoing opinion in the light of the opinion of the *Nugent* case, I am still satisfied with it, and that any other doctrine practically nullifies the constitutional provision, which originated in necessity and was intended to protect the people from the abuse of the power to aid railroads by loaning them their credit or purchasing their stock. [REP.]

See *Thomas v. Scotland County*, *ante*, p. 7.

Nicolay v. St. Clair County.

ALBERT H. NICOLAY v. ST. CLAIR COUNTY.

1. Where legislative power is given to a county court to subscribe on behalf of the county to the stock of a railroad company, without restriction or precedent conditions, and to issue negotiable bonds in payment therefor, and the proper county court issues the bonds, reciting therein that they are issued under an order of said court made pursuant to legislative act conferring the power, a *bona fide* holder for value is not affected with constructive notice of facts recited in the order contrary to the recitals in the bonds.
2. Legislation of Missouri as to power to municipalities to subscribe to the stock of railways, the constitutional provision of 1865, and the decisions of the supreme court of the state on the subject, reviewed, and those decisions followed and applied.

(Before DILLON and KREKEL, JJ.)

Municipal Aid to Railways. — Special Charters. — Constitutional Provision. — Decisions of State Supreme Court. — Branch Railroads.

THIS is an action upon coupons originally annexed to bonds issued by the county of St. Clair. The coupons are in the usual form. The following is a copy of one of the bonds, dated July 1st, 1870, from which the coupons in suit have been detached :

"United States of America. State of Missouri, county of St. Clair. County Bond. Interest ten per cent per annum, payable on the first days of January and July.

"*Know all men by these presents*, That the county of St. Clair, in the state of Missouri, acknowledges itself indebted and firmly bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis branch of the Tebo and Neosho Railroad, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company or bearer, to aid in building said branch railroad, at the Bank of Commerce, in the city of New York, on the first day of July, A. D. 1882, together with interest thereon from the first day of

Nicolay v. St. Clair County.

July, 1870, at the rate of ten per cent per annum, which interest shall be payable semi-annually, on the first days of January and July of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

“ This bond is issued under and in pursuance of an order of the county court of the county of St. Clair, in the state of Missouri, and in pursuance of and by authority of an act of the general assembly of the state of Missouri, entitled ‘ an act to incorporate the Tebo and Neosho Railroad Company,’ approved January 16th, 1860; and of an act of the general assembly of the state of Missouri, entitled ‘ an act to aid in the building of branch railroads in the state of Missouri,’ approved March 21st, A. D. 1868.

“ In testimony whereof, the said county of St. Clair has executed this bond by the presiding justice of the county court of St. Clair county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court.”

[The bond is duly signed and sealed.]

The petition states the legal effect of the bond and its recitals, and no question is made as to its sufficiency. Copies of the bonds are filed with the petition.

An answer is filed in denial; and also setting up as an affirmative defense facts intended to show that the county had no power to make the subscription or to issue the bonds. One reason for the alleged want of authority to issue the bonds is that they were issued without any vote of the people, as required by the constitution of the state (article 11, section 14); that the county court of St. Clair county, on January 21, 1870, without any vote of the people of the county, passed and entered of record an order “ to subscribe for and take two thousand five hundred shares of the capital stock of the Clinton and Memphis *branch* of the Tebo

Nicolay v. St. Clair County.

and Neosho Railroad Company, each of the denomination of \$100, and amounting in the aggregate to \$250,000, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company, approved January 16, 1860, and under an act of the general assembly of the state of Missouri, entitled 'an act to aid in the building of branch railroads in the state of Missouri,' approved March 21, 1868, and in accordance with the orders of the board of directors of the said Tebo and Neosho Railroad Company establishing the said branch railroad, and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, said stock thus subscribed to be paid for by the issue of the bonds of the county, to be delivered in installments, as the work of graduation and masonry shall be let to responsible persons." The answer contains also an order of the county court, November 1, 1870, reciting that the work of graduation and masonry has been let by the Clinton and Memphis branch of the Tebo and Neosho Railroad Company, and ordering bonds for the \$250,000 "to be at once signed, sealed, and delivered to said branch railroad company, or to its financial agents appointed to receive and negotiate the same."

The answer sets up and insists that the subscription was in fact made, and the bonds delivered to the Clinton and Memphis *branch* of the Tebo and Neosho Railroad Company, and not to the Tebo and Neosho Railroad Company; and alleges that such a subscription is unauthorized, and bonds issued therefor void.

The answer also sets up that *after* the order of the county court making the subscription as aforesaid, and prior to the issue of the bonds, pursuant to the statutes of Missouri, the Tebo and Neosho Railroad Company, with the assent of its stockholders, sold and conveyed all its rights, franchises, and property to the Missouri, Kansas, and Texas Railway Company (a Kansas corporation), and thereupon ceased to

Nicolay v. St. Clair County.

exist, and the county court ceased to have any authority to issue the bonds to the former company or to the branch. The answer concludes by alleging that of all the facts therein stated the plaintiff had full notice.

To the new matter in the answer the plaintiff demurs, and it was on this demurrer that the case was submitted.

Grant & Smith, and Dryden & Dryden, for the plaintiff.

Phillips & Vest, and Nesbitt & Ferguson, for the defendant.

DILLON, *Circuit Judge*. — The bonds here in controversy were issued by the county court of St. Clair county, and recite an indebtedness on the part of the county "to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company, in the sum of, etc., which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid in building said branch railroad."

The bonds also contain this recital: "This bond is issued under and in pursuance of an order of the county court of the county of St. Clair, in pursuance of and by authority of an act of the general assembly of the state of Missouri, entitled 'an act to incorporate the Tebo and Neosho Railroad Company,' approved January 16, 1860, and of an act entitled 'an act to aid in the building of branch railroads in the state of Missouri,' approved March 21, 1868."

The charter of the Tebo and Neosho Railroad Company thus referred to in the bonds, approved January 16, 1860 (Laws, 1859-60, p. 402, sec. 6), prescribes the *termini* and general course of the main line of the road which it authorized this company to build, and gives to the company express authority to "extend *branch* railroads into and through any counties the directors may deem advisable," without any limitation whatever.

This charter (section 8) adopts and re-enacts *inter alia*, section 14 of the charter of "the Osage and Southern Kansas Railroad Company," approved November 21, 1857 (Laws of 1857, p. 59), and declares that section, with others "to be applicable to the company hereby incorporated, and all the powers therein contained are extended to the Tebo and Neosho Railroad Company."

The 14th section of the charter of the Osage and Southern Kansas Railroad Company, thus adopted, reads as follows: "SEC. 14. It shall be lawful for the county court of any county in which any part of the route of said railroad or branches may be, or any county adjacent thereto, to subscribe to the stock of the company, and, for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court."

In 1865 the present constitution of the state of Missouri was adopted, containing the following: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." (Article 9, section 14.)

At the time the constitution was framed there was a large number of charters in force specially incorporating railroad companies, and authorizing, as in the case of the Tebo and Neosho Company, the county courts of counties along their lines, or branches, or adjacent thereto, to subscribe for the stock of railroad companies, without any limitation as to amount, and without requiring a previous election or the assent of the tax-payers or people of the county. That such extraordinary powers, conferred, without limit or check, upon the small number of persons who compose the county

Nicolay v. St. Clair County.

court, would open the door to abuses, to frauds upon the officers and frauds by them, and to extravagant and unwise indebtedness, ought to have been foreseen by the legislature, although in 1860, and prior to that time, the evils which come from unlimited grants of power of this kind were not so well known as at present.

After the adoption of the constitution of 1865, the question as to the effect of the 14th section of the 11th article thereof, above quoted, upon these special charters, came before the supreme court of the state for its judgment. That court held that powers conferred in these special charters upon the county courts to subscribe without a vote of the people, were not repealed or touched by the prohibition of the constitution, its view being that the constitution did not affect existing charters, but only limited the power of the legislature in the future. This point was first decided in the Macon county case (*State, ex rel. etc. v. Macon County Court*, 41 Mo. 453, 1867), and this is the settled law of the state. (*The Chillicothe, etc. Co. v. Brunswick*, 44 Mo. 553, 1869; *Kansas City, etc. R. R. Co. v. Aldermen*, 47 Mo. 349, 1871; *State v. Sullivan County Court*, 51 Mo. 522; *Smith & Hall v. Clark County Court*, decided by the supreme court of Missouri, November 3, 1873, 54 Mo. 58.)

In this last case the legislation and judicial decisions of the state on the subject of municipal aid to railways is reviewed by the able judge who delivered the opinion of the court, in which, speaking of this subject, he says: "So that the provisions of the revised code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court or any individual judge thereof, so far as the reports show, not to effect the repeal of the privilege contained in special charters."

Nicolay v. St. Clair County.

Not only so, but the case of the *State v. Sullivan County Court*, above cited, also decides that under such a charter as the Tebo and Neosho Railroad Company, the county court of a county along a *branch* railroad may subscribe for the stock of the company and issue bonds therefor. The subscription in this case, which was sustained by the supreme court of the state, was one by the county of Sullivan "to the St. Joseph and Iowa Railroad Company, in the name and for the use of the *central branch* of the St. Joseph and Iowa Railroad Company" — the same precisely as the one recited in the bonds in question issued by the county of St. Clair.

The decisions of the supreme court of the state, therefore, settle the point that, under the charter of the Tebo and Neosho Railroad Company, the county court of St. Clair county had the power to make, without any vote of the people of the county, precisely the kind of a subscription which the bonds in suit recite they did make, and to issue the bonds of the county therefor. The county court having the power to subscribe and to issue the bonds, and a valid subscription being recited in the bonds, the plaintiff can recover thereon if he purchased them *bona fide* for value, and without actual notice of any irregularities in the exercise of the power by the county court. The securities are authorized and made to be sold in distant places, and the supreme court of the United States has repeatedly decided that a purchaser of such bonds, while he is bound to ascertain whether the legislature has conferred the *power* to issue them, is not bound to ascertain whether the local officers intrusted with the execution or carrying out of the authority have properly pursued the directions or requirements of the law authorizing their issue. The cases in the supreme court are collected and stated in Dillon on Municipal Corporations, section 415, *et seq.* See, also, *Kenicott v. Wayne County*, 16 Wall. 452, and *Huidekoper v. Buchanan County*, decided here at this term, *post*, p. 171.

Nicolay v. St. Clair County.

A *bona fide* purchaser of one of these bonds is not bound to look into the records of the county court which made the subscription, and is not chargeable with constructive notice of their contents; and hence the fact that the order shows that the subscription by the county court of St. Clair county was not to the capital stock of the Tebo and Neosho Railroad Company, but to the stock of the "Clinton and Memphis branch of the Tebo and Neosho Railroad Company," is no defense, provided the plaintiff is a holder of the bonds for value, without actual notice of this fact.

These views dispose of the only defense which counsel have urged in their briefs, unless *actual* notice to the plaintiff of the facts set forth in the orders of the county court is intended by the pleader.

If he intends to rely upon *constructive* notice only, the plea should be modified accordingly; and in that event the demurrer to the answer will be sustained. If he means *actual* notice, then the demurrer should be overruled; or at least we should consider further, whether, under the charter, or under the act of March 21, 1868 (relating to branch railroads), recited in the bond, or both, there was any power to subscribe by the county to the stock, not of the company, including the branches, but to the stock of the branch alone.

NOTE.—The answer was amended so as to allege actual notice, and afterwards, upon a trial, the plaintiff had judgment, and the defendant sued out a writ of error.

As to bonds issued under the *branch* railroad act of March 21, 1868, see *Washburn v. Cass County*, *post*.

Huidekoper v. Dallas County.

ALFRED HUIDEKOPER v. DALLAS COUNTY.

Charters of railroad corporations existing at the date of the adoption of the constitution of Missouri of 1865, and which granted authority to counties to subscribe for the stock of railroads, and to issue bonds to pay for the same without a vote of the people, were not affected by the provision of the constitution (art. 11, sec. 14), requiring a two-thirds vote: So held by the state supreme court in what is known as the *Macon County Case*, 41 Mo. 453, and which is followed by this court.

(Before DILLON and KREKEL, JJ.)

Municipal Bonds.—Constitutional Provision.—Precedent Vote.—
Macon County Case, 41 Mo. 453, *Followed*.

THIS is an action on coupons of bonds issued by Dallas county, to the Laclede and Fort Scott Railroad Company or bearer.

The petition refers to the act under which the bonds were issued, alleges that for the subscription made the county obtained stock certificates which it still holds; that the county has exercised the rights of a stockholder; that it paid the three first installments of interest, but has failed to pay the coupons in suit on presentation.

The defense is that the order of the county court making the subscription was without authority of law; that the issuing of the bonds was made dependent on conditions in the order of subscription, which conditions have not been fulfilled; that the order of subscription had been repealed before the bonds were actually issued.

The reply denies all of the allegations of the answer.

Plaintiff on trial read the order of the county court of August 5th, 1869, making the subscription and the amendments thereto, produced the bonds and coupons, dated July 1st, 1870, read from the record of the county court the appointment of the agent of the county to prepare the bonds, and directing the presiding justice and clerk to sign and

Huidekoper v. Dallas County.

seal the same, read the report of the county agent, showing the obtaining of stock certificates for bonds issued at various times, and the approval thereof by the county court, and various orders authorizing the borrowing of money to pay interest coupons as they become due.

The only testimony offered by defendant is an order of the county court dated August 2, 1870.

Mr. Shippen, for the plaintiff.

Mr. Ellis and *Mr. Botsford*, for the county.

KREKEL, J.—There is no inherent power in the county courts of Missouri to make railroad subscriptions, and hence the power must either be granted in the charter of the company to which subscription is made, or must be found in the general law upon the subject. In the case before the court, power to subscribe is found in the 14th section of the act incorporating the Laclede and Fort Scott Railroad Company, approved Feb. 11th, 1860, in the following words: "It shall be lawful for the county court of any county in the state to subscribe to the stock of said company; and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay for the same, and to take proper steps to protect the interest of the county." Here then we have the power of the county court to subscribe without submission, and in the exercise of that power the county court of Dallas county on the 5th day of August, 1869, made and entered the following order upon its record:

"It is ordered by the court that one hundred and fifty thousand dollars be, and the same is hereby, subscribed to the capital stock of the Laclede and Fort Scott Railroad Company for and on behalf and for the use and benefit of said county of Dallas." After providing the size of the bonds,

Huidekoper v. Dallas County.

the rate of interest, how and where to be paid, the order referred to exacts conditions as to the issue and delivery of the bonds as the work progresses, which conditions were afterward modified so that the bonds might be issued at once. There are no allegations of fraud in the issuing of these bonds, nor has there been any attempt made to show such fraud, but the objection is that the subscription was not submitted to a vote of the people. Provisions of law as to subscriptions of this kind are found upon the statute books of Missouri as early as 1837, and continued to be granted in a large majority of charters which were passed by the legislatures from time to time. The 30th section of the general railroad law of 1855 gives power to subscribe to railroads in the following words: "It shall be lawful for the county court of any county and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this state, and the county court or city council subscribing or proposing to subscribe to such capital stock, *may*, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city, as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation." The act of January 14th, 1860, changed the word *may* in the act quoted, to *shall*. The act of March 23d, 1861, made it the duty of the county court or city council of any city, whenever satisfied that the people wanted to subscribe stock to any railroad company, to order an election, and if a majority of the resident qualified voters voted therefor, to subscribe such stock.

The second section of the last quoted act provides that no subscription should be made unless the same had been voted for by a majority of the resident voters. Thus stood the law when the convention which framed the present constitution of the state met. The increasing interest in rail-

Huidekoper v. Dallas County.

road improvements and the evasions of existing laws caused the enactment of a constitutional provision in the following words: "The general assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." This provision would, no doubt, have prevented many unwise subscriptions for railroads, but for the existence of a very large number of charters at the time, and the opinion of the supreme court of Missouri, construing the constitutional provision as not applying to them. Many of these charters were by special enactment exempted from the provision of the general railroad law requiring submission, being, at the same time, authorized to build branches. The question as to the rights of the corporation under these charters came before the supreme court of Missouri at the Oct. term, 1867, in the *Macon County Case*, 41 Mo. 453, and it was there held that it did not apply to them, and subscriptions could still be made to corporations having special charters, as stated, without submission.

To this doctrine the supreme court of Missouri has steadily adhered up to this time (*Clarke County Case*, 54 Mo. 58). The construction of a special constitutional or statutory provision, given by the highest judicial tribunal of a state, is binding upon the federal judiciary, and has been applied in many similar cases determined at this term. It must be held, then, that the subscription made by the county court of Dallas county, under the authority of the provisions of the charter of the Laclede and Fort Scott Railroad to its stock, was valid and binding. The irregularities set up in the answer can not avail the defendant, a holder for value. The only one relied on is the order of the county court of August 2, 1870. It will be observed that the bonds and coupons bear date prior to this last mentioned order. Sup-

Huidekoper v. Buchanan County.

posing, however, that the bonds were actually issued, as alleged in the answer, after August 2, 1870, could that avail the defendant? The court thinks not. In the first place the repealing order referred to is utterly ignored in the after proceedings of the county court, and treated as a nullity. But not only that, the county court proceeds to pay the interest from time to time, and may be said to have thus waived the irregularity, if such. Even if a fraud had been committed in the issuing of the bonds under those circumstances, an innocent holder is not affected thereby. The bonds must be held valid, and judgment will be rendered for the plaintiff in the amount of the coupons sued on.

DILLON, *Circuit Judge*, concurs.

JUDGMENT ACCORDINGLY.

F. W. HUIDEKOPER v. BUCHANAN COUNTY.

Where legislative authority is conferred upon a municipal or public corporation to issue bonds on the sanction of the voters to be given at an election, and the officers of the corporation are by the law to decide whether the requisite sanction has been given, and they issue bonds which recite it, no irregularity in the manner of appointing the judges of the election, or in submitting the question, is a defense to the bonds thus issued, when in the hands of *bona fide* holders for value, without actual notice.

(Before DILLON and KREKEL, JJ.)

County Bonds.—Legislative Authority.—Previous Election.—Recital in Bonds.

THIS is an action upon coupons to bonds issued by the county court of the county of Buchanan in payment for stock subscribed to the St. Louis & St. Joseph Railroad Company. The answer sets out all the orders of the coun-

Huidekoper v. Buchanan County.

ty court, from which it appears that on the 21st day of February, 1868, the county court ordered to be submitted to a vote of the qualified voters, at an election to be held on a specified day in April, 1868, the proposition whether the county court "should subscribe for 4,000 shares of the capital stock of the St. Louis & St. Joseph Railroad Company, amounting, in the aggregate, to \$400,000, upon the terms following: Said subscription to be paid for in the bonds of the county at par, payable twenty years after the date of their issue," etc.

Then follows conditions that the bonds shall only issue in installments as the work on the road within the county shall progress. The county court appointed certain persons named, "judges of the election to be holden on, etc., for the purpose of submitting to a vote of the taxable and qualified voters of the county [the question of] the subscription of \$400,000 to build a railroad known as the St. Louis & St. Joseph Railroad."

The records show that the clerk of the county court "brought into court the returns of the votes cast, certified according to law," showing "that there were cast for the subscription to the St. Louis & St. Joseph Railroad, 1,968; and against it, 520 votes."

On the 13th day of April, 1868, the county court made an order of record reciting that "whereas, it appears, to the satisfaction of the court, that two-thirds of the qualified voters of Buchanan county, at said special election, held therein as aforesaid, did assent to said subscription of 4,000 shares to the capital stock of the St. Louis & St. Joseph Railroad Company; therefore, it is ordered by the court that the county court of Buchanan county subscribe for and take 4,000 shares, to be paid for according to the order of this court, made on the 21st day of February, 1868." Subsequent orders of the court recite that the subscription was made, that the company complied with the terms and con-

Huidekoper v. Buchanan County.

ditions which would entitle it to the bonds, and that the bonds were accordingly, from time to time, executed and delivered to the company to the full amount, in all, of \$400,000. The record also shows that taxes were levied to raise the means to pay the interest on these bonds from time to time, and interest ordered to be paid until January 21st, 1873, when the county court directed the treasurer "not to pay interest due on the bonds of the county issued to the St. Louis & St. Joseph Railroad Company until further orders from the court."

To this answer the plaintiff demurs.

Joseph Shippen and T. K. Skinker, for the plaintiff.

Ensworth & Young, for the county.

DILLON, *Circuit Judge*.—The answer shows that there was an election held to enable the voters of the county to determine whether the county court should subscribe to the stock of the St. Louis & St. Joseph Railroad Company, and pay therefor in the negotiable bonds of the county; that more than two-thirds of the voters voting at such election were in favor of the proposition; that the county court thereupon made the subscription, and from time to time issued the bonds as the railroad company became entitled thereto by the terms of the submission. It is not denied in the answer that the plaintiff is a *bona fide* holder of the coupons in suit.

The counsel for the county contends that the bonds in question are void for three reasons :

1. That the county court had no power to appoint judges of the special election to be held on the 7th day of April, 1868, to decide upon the question of subscription, but that such power, under the act of March 21st, 1868 (Laws 1868, p. 131, sec. 15), belonged to the board of registration.

Huidekoper v. Buchanan County.

2. That the question was ordered to be submitted to the "taxable and qualified voters" of the county, instead of the "qualified voters," as required by the constitution (art. 11, sec. 14).

3. That the submission was not an unqualified one, but contained conditions. These conditions related to the manner in which the bonds should be issued in case the proposition carried, and required work to a specified amount to be done by the company before it should become entitled to the delivery of an installment of the bonds. These conditions were in the interest of the county, and the orders of the county court show that they were complied with by the company.

It will be perceived that all of these objections relate to irregularities in the submission of the question to a vote of the people, and in the manner of appointing the judges of the election. It may be remarked that the record of the county court does not sustain the position of the counsel of the county that the submission was to the "taxable and qualified voters." On the contrary, the submission was to the qualified voters. The use of the words "taxable and qualified voters" occurs in that portion of the order appointing the judges of the election, and is recitative only of the order of submission, and its misrecital is a matter of no importance.

There is, therefore, really but one objection to the validity of these bonds left to be considered, and that is whether, if the defendant's counsel be right that the judges of election should have been appointed by the board of registration, this is a fatal defect. It is not necessary in this case to inquire whether if there had been no election whatever, the bonds could have been enforced against the county, notwithstanding the constitutional provision. (Art. II. sec. 14.) Here there was an election, and the proposition received, according to the determination of the county court entered

Huidekoper v. Buchanan County.

upon its records, the assent of more than the requisite two-thirds of the qualified voters of the county.

Counsel have differed as to whether the decisions of the United States supreme court have gone so far as to hold valid bonds issued by the municipal or public officers without any election whatever having been held, when such an election is required as a condition precedent to the exercise of the power to subscribe for stock and issue bonds to pay therefor—and we are not required to examine or discuss that question. But beyond all doubt that court has time and time again decided that no such defect or irregularity as that which is here set up is available as a defense to the *bona fide* holder of such securities. The well-known doctrine of that court is that bonds, such as those here in question, are commercial paper, and when in the hands of an innocent holder no defense is available to the maker, except the want of power from the legislature to issue them.

It is not needful to examine the decisions of that court upon this subject. To show, however, that the doctrines announced in the early case of the *Commissioners of Knox County v. Aspinwall*, 21 How. 539, and often re-affirmed, are still adhered to, we content ourselves by referring to the very recent cases of *St. Joseph Township v. Rogers*, 16 Wall. 644; and *Kennicott v. Wayne County*, 16 Wall. 452, both decided at the December term, 1872. In the case first cited, Mr. Justice CLIFFORD, summarizing the doctrines of the court on this subject, says: "Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, when issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications, but if it

Huidekoper v. Buchanan County.

appears that the bonds issued show, by their recitals, that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect, will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which is alleged was not fulfilled."

In the case last cited (*Kennicott v. Wayne County*), Mr. Justice HUNT, delivering the judgment of the court, said:

"The following propositions may be considered as settled in this court:

"1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists or has taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds. (Authorities, *infra*.)

"2. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, can not be urged against a *bona fide* holder seeking to enforce them. (*Grand Chute v. Winegar*, 15 Wall. 572; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *Gelpcke v. Dubuque*, 1 Wall. 203; *Moran v. Miami Co.* 2 Black, 722.

"3. There must, however, be an original authority, by statute, to the municipality to issue bonds. Municipal corporations have not the power, except through the special

Judson v. City of Plattsburg.

authority of the legislature, to issue corporate bonds which will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns, without special authority. (*Marsh v Fulton County*, 10 Wall. 676.)"

To the same effect see also *Grand Chute v. Winegar*, and the recent decision of the supreme court in the state of Missouri in *Smith v. Clarke, County*, November term, 1873, 54 Mo. 58.

The demurrer to the answer is sustained.

JUDGMENT ACCORDINGLY.

NOTE.—Decisions of Missouri supreme court referred to: *Thomas v. Scotland Co. ante*, p. 7.

Subsequent decisions of United States supreme court made at the October term, 1874, announce the same doctrines.

DAVID C. JUDSON v. CITY OF PLATTSBURG.

1. To an action on negotiable bonds issued by the defendant city, it pleaded that the act incorporating it was unconstitutional: 1st, because the subject of the act was not expressed in its title; 2d, because under the constitution of Missouri, the legislature could not amend the charter of the *town* corporation by making it a *city* corporation; 3d, because Plattsburg did not in fact have 5,000 people when it was incorporated as a city, as required by the constitution of the state: *Held*, that neither of these objections was well taken.
2. *It seems* that a special registration of voters of a special municipal election was not necessary; but if it were, a *bona fide* holder of bonds for value without notice would not be affected by the omission, the bonds reciting that they were duly authorized by a vote of the voters of the city.

(Before DILLOX and KREKEL, JJ.)

Municipal Bonds.—Validity of City Charter.—Election.—Registration.

ACTION on coupons originally attached to negotiable bonds issued by the defendant city under its seal, and reciting the

Judson v. City of Plattsburg.

necessary vote. An answer set up the defense, referred to in the opinion of the court, but did not allege that the plaintiff was not a *bona fide* holder of the bonds or coupons for value. The plaintiff demurred.

Judson Barnard, and *Merryman & Hall*, for the plaintiff.

Lay & Belch, and *Thos. C. Reynolds*, for the defendant.

KREKEL, J.—This is an action on coupons detached from the bonds issued by the city of Plattsburg in payment of indebtedness to the Chicago and Southwestern Railway Company.

The answer sets up that the act incorporating the city of Plattsburg, amendatory of the act of February 8th, 1861, is and always was unconstitutional and void.

A demurrer to this part of the answer makes it necessary to examine the enactments creating this corporation. It appears that the general assembly of the state of Missouri, on the 8th day of February, 1861, passed an act "to incorporate the town of Plattsburg," granting it usual municipal powers. Under this act the corporation existed up to the 24th day of March, 1870, when an amendatory act, entitled, "Towns and Cities: Plattsburg. An act to amend an act entitled an act to incorporate the town of Plattsburg, approved February 8th, 1861," was passed.

Three objections in support of the unconstitutionality of this amendatory act are suggested:

First.—As to the title of the act.

The constitutional provision in reference to the title of acts is, "that no law shall relate to more than one subject, and that shall be expressed in its title."

This provision of the constitution mainly aims at vicious legislation, by which, under a fraudulent title, the subject-matter of the enactment was to pass unobserved by reading

Judson v. City of Plattsburg.

the title, merely. That it was not intended to apply to the incorporation of a city, is obvious from the fact that many subjects are to be provided for in such an act, and though they may all, in a certain sense, pertain to one subject, it could not be expressed in its title. More than ordinary caution seems to have been taken in framing the incorporating act of the city of Plattsburg, as may be seen by reference to its title.

The second question is as to the right to amend the town corporation of Plattsburg by incorporating it as a city. The right to amend existing laws under the constitutional provision, that "all statute laws of this state, now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation or be amended or repealed by the general assembly," is decided by the supreme court of Missouri, in the case of *The State ex rel. v. C. G. and St. L. R. R.* 48 Mo. 468, and we adopt this interpretation of the constitutional provision cited as in principle deciding the right of the legislature to amend the charter of the town of Plattsburg.

The next point made is that the town of Plattsburg, having less than 5,000 inhabitants, the general assembly was prohibited from erecting them into a city by the constitutional provision that "no city shall be incorporated with less than 5,000 permanent inhabitants." It is obvious from the provision itself that it applies to the internal political sub-division of the state, and must therefor, be held to be within the exclusive jurisdiction of the legislative power of the state, and that power, by its act of incorporation, having established this sub-division, the question of its legality cannot be examined collaterally. In a case which required the ascertainment of a fact upon which legislative authority to act depended, the exercise of that authority carries with it the presumption that the fact had been ascertained, and that the legislature acted within the sphere of its authority.

Judson v. City of Plattsburg.

This disposes of the demurrer to the first count of the answer, and the same is sustained.

There is a demurrer, also, to the 6th and 7th subdivisions of the second count of the answer, which sets up want of authority to hold an election, denies that a legal election was held, denies that conditions of subscription were complied with, and many other formalities pertaining to the subscription.

The only question here made, not already decided in the bond cases at this term, is the want of registration of voters prior to the special election at which the subscription of \$25,000 was voted on. The town of Plattsburg had not been set apart or designated as an election district, but was embraced in the township district in which it was situated. Under the constitutional provision upon obtaining a two-thirds vote in favor, the town had an unquestioned right to subscribe. There was to be no special township election, and hence no need of a special registration for such. There being no provision under the law of 1868 requiring special registration of towns for municipal elections when such towns were embraced within and a part of a township election district, as was the case with Plattsburg, use was made of the last township registration. We are not prepared to say that the election thus held was illegal, but be that as it may, we are of the opinion that a *bona fide* holder of bonds for value is not bound to inquire into the formalities of an election.

The demurer to the 6th and 7th subdivisions of the second count of the answer is therefore sustained.

DILLON, *Circuit Judge*, concurs in the result.

JUDGMENT ACCORDINGLY.

NOTE.—As to sufficiency of title to acts under the constitution of Missouri, see *Murdock v. Woodson*, 2 Dillon C. C. R. 188.

Jordan v. Cass County.

ELIZABETH J. JORDAN v. CASS COUNTY.

1. The act of the general assembly of Missouri of March 23, 1868 (Laws of 1868, p. 927, 1 Wagner's Statutes, p. 812), authorizing *township* aid to railways, is not in conflict with the constitution of the state.
2. Article 11, section 14, of the constitution of the state, which prohibits the legislature from authorizing any "county, city, or town" to subscribe for the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not restrain the legislature from authorizing *township* aid to railways, if two-thirds of the voters of the township shall sanction the proposition.
3. Whether the legislature could, in the case of townships, dispense with the popular sanction, doubted, but not decided.
4. As townships were not incorporated bodies, the act of March 23, 1868, above mentioned, when the proposal has been adopted by the voters of the township, authorized the *county court* to issue bonds, *in the name of the county, on behalf* of the township voting the aid. *Held* (construing the legislation of Missouri): 1. That the owner of bonds thus issued by a county (or a township) had no remedy by *action* against the township, or taxable inhabitants therein. 2. That the remedy of the owner of the bonds was by *mandamus* to the county court, to compel it to levy and collect the special tax which the act provided as the means to pay the bonds and interest thereon. 3. That such an owner could *sue the county* in whose *name* the bonds were issued, in the federal court, and recover judgment thereon; but that such judgment could not be enforced against the county or its property, or the tax-payers of the county at large, but only by *mandamus* to the county court to compel the levy and collection of a special tax, according to the statute in such case provided.

(Before DILLON and KREKEL, JJ.)

Township Railroad Aid Act.—Remedy of Bondholder.

THIS is an action against the county of Cass, upon coupons attached to what are known as "*township* bonds." The material part of one of the bonds is as follows:

"\$1,000. State of Missouri. Cass County Bond.

"*Know all men, etc.,* That the county of Cass, in the state of Missouri, acknowledges itself indebted and firmly bound to the Pacific Railroad of Missouri, in the sum of \$1,000, which sum the said *county of Cass, for and on account of Mt.*

Jordan v. Cass County.

Pleasant township, hereby promises to pay said company, or bearer, at, etc., seventeen years after date, with interest, etc. This is one of twenty-five bonds for \$1,000 each, issued pursuant to an order of the county court of said county of Cass, made by authority of an act of the general assembly of the state of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the Pleasant Hill and Lawrence branch of the Pacific Railroad of Missouri."

The bond is signed by the presiding justice and attested by the clerk, and sealed with the seal of the county court of Cass county.

The petition is in due form, and asks a judgment against the county for the amount of the coupons in suit, with interest, damages, and costs.

The county demurs to the petition, on the grounds that the bonds are not the bonds of the county, but of Mt. Pleasant township, on which alone they are binding; that two-thirds of the qualified voters of the *county* did not assent to the issue thereof; and that the act of March 23, 1868, under which they purport to have been issued, is unconstitutional.

The constitution of the state of Missouri, which went into force in 1865, contains the following: "The general assembly shall not authorize any *county, city, or town* to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall consent thereto." (Article 11, section 14.)

At the time when the constitution of 1865 was adopted, and when the act of March 23, 1868, under which the bonds in question were issued went into effect, there were statutes, authorizing counties, cities, and incorporated towns

to aid in the building of railways; but the above mentioned act of March 23, 1868, is the first that gave such powers to *townships*.

This act (Laws of 1868, p. 92, 1 Wagner's Statutes, p. 313) provides that, upon the petition of twenty-five "tax-payers and residents of any *municipal township for election purposes*," the county court shall order an election to be held in the township, to determine whether the proposed subscription to the capital stock of the company building or proposing to build a railroad into, through, or near the township, shall be made. The further provision is, that if "not less than two-thirds of the qualified voters of such township, voting at such election, are in favor of such subscription, it shall be the duty of the *county court* to make such subscription *in behalf of such township*;" and if so voted, "the county court, in payment of such subscriptions, shall issue bonds, *in the name of the county*, with coupons for interest attached."

To pay for the subscription, or to pay the principal and the interest on the bonds, if bonds have been issued, the provision is, "that the *county court* shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a *special tax*, which shall be levied on all the real estate lying *within the township* making the subscription."

The further provision is that the revenue officers of the county are to collect this special tax, and apply the same exclusively to pay such subscription or bonds; and the county court is required to cancel bonds which shall be paid.

Under this state of the law, the question on the demurrer was, whether an action upon the bonds issued by the county court, under this act, in the name of a county in behalf of a township, could be maintained against the county. Many similar actions are pending, and the question was argued by

W. B. Napton, T. K. Skinker, and others, for the bondholders.

Jordan v. Cass County.

W. P. Hall, N. Holmes, Gage & Ladd, Robert Adams, Jr., Glover & Shepley, and others, for the counties.

DILLON, *Circuit Judge*. — The bonds under consideration were issued under the act of March 23, 1868, by the county court of the county, in the name of the county, on behalf of the township. This act has been held constitutional by the supreme court of the state (*State, ex rel. etc. v. Linn County*, 44 Mo. 505), and it is our opinion that the constitution of the state (article 11, section 14), which prohibits the legislature from authorizing any "*county, city, or town*" to subscribe to the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not prohibit the legislature from authorizing *township* aid to railways, if two-thirds of the voters of the township shall sanction the proposition. Whether the legislature could authorize township aid to railways without the assent of two-thirds of the voters therein, need not be determined, for it has not undertaken to do so. The section of the constitution above mentioned does not in terms limit the legislative power, except as respects "counties, cities, and towns;" but other municipal creations would be within the mischief the constitution intended to remedy, and hence, it would seem, within its spirit and meaning. Supposing this to be so, however, the only limitation on the legislature would be, that it could not authorize the aid by townships, or by the people within them, without the popular sanction which the constitution requires. It would not be a fair or legitimate construction of the provision of the constitution, to hold that it *absolutely* disabled the legislature as respects municipal creations or civil divisions of the state not therein mentioned.

Treating the act of 1868 as valid, the next question is, whether the holder of bonds issued in accordance with its provisions — that is, by the county court, *in the name of the county* on behalf of the township, pursuant to a two-thirds

Jordan v. Cass County.

vote of the citizens of the township—can maintain an action thereon, for any purpose, against the county in whose name the bonds are made. At the outset of this inquiry, it may be remarked that we do not understand the plaintiff's counsel to contend that the bonds are the proper debt or obligation of the county, or that payment thereof may be enforced against the property of the county, or against the tax-payers or property in the county at large. The bonds recite that they were authorized by a two-thirds vote of the *township*; and, under the provision of the constitution above mentioned, not having been authorized, or purporting to have been authorized, by a vote of the qualified voters of the *county*, it is clear that they impose no obligation on the county, and equally clear that the real or ultimate liability is on the taxable property within the township. But how, and against whom, is this liability to be enforced and made available?

It is urged by the counsel for the county that the remedy of the bondholder is by an action against the township, or against the tax-payers and residents of the township, in whose behalf the bonds were issued. But there is no statute in Missouri creating "municipal townships for election purposes" bodies politic, and no provision is made for suits by or against them.

Undoubtedly the legislature designed that there should be a remedy upon these bonds; and if it were consistent with the legislative intent, the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, a body corporate, and, as such, liable to be sued. But such a view is not necessary to give a remedy, and seems not to be consistent with the express provisions that the bonds should be issued in the name of the county, and the necessary taxes to pay them be levied and collected by the officers of the county. We are impressed with the con-

Jordan v. Cass County.

viction that this was done by the legislature because of the want of corporate power in the "municipal township for election purposes."

The next suggestion is that the action should be against the tax-payers and residents of the township in analogy to the principle of the well known case of *Russell v. The Men of Devon*, 1 Term R. 667, and to the *personal* liability of the inhabitants of towns in New England for judgments against the town corporations. (*Beardsley v. Smith*, 16 Conn. 368; Dillon on Municipal Corporations, sections 446, 687, 693, n.)

Such a personal liability on the part of the inhabitants for the debts of a public, municipal, or *quasi* corporation, is not elsewhere recognized to exist, and could not be enforced by an action at law without contravening the mode prescribed by the act under which the bonds were issued for acquiring the means of making payment thereof. The legislature has provided the mode of raising the means for making payment of the bonds, which is by the levy and collection of a "*special tax*" for that purpose, to be "levied on all the real estate lying within the township," and it has specially enjoined upon the county court the duty of levying and causing such to be collected; and, undoubtedly, this is such a duty as, supposing the bonds to be valid, may be enforced by *mandamus*. It is, to our mind, clear that the bondholder, if he chose to resort to the *State* tribunals, might, without first obtaining a judgment against either the county or township, file an information for a writ of *mandamus*, to be directed to the county court, to compel it to levy and cause to be collected the special tax from which alone can come the funds that the law has provided for the payment of the bonds. (Dillon on Municipal Corporations, sec. 685, etc.) But this court has no original jurisdiction in *mandamus*. It cannot acquire jurisdiction by an original proceeding in *mandamus*, but when jurisdiction otherwise exists it may issue the writ when necessary to the exercise of such juris-

Jordan v. Cass County.

diction, agreeably to the principles and usages of law. (*Bath County v. Amy*, 14 Wall. 244; *United States v. Union Pacific R. R. Co.* 2 Dillon, 527.) Therefore, the holder of these bonds cannot have any remedy in the federal court unless he is entitled to recover a judgment thereon, and to enforce such judgment, if necessary, by *mandamus*. This results not from any intrinsic difference in this respect between the state and federal courts, but from the peculiar language in which the jurisdiction of the circuit court of the United States is conferred by the Judiciary act.

We are thus brought to the question whether a holder of bonds issued pursuant to the act of March 23, 1868, may recover judgment thereon against the county in whose name they are issued, to be enforced, if necessary, not by an execution against the county, but by *mandamus* against the county court to compel it to levy upon the property in the township the special tax which the law has enjoined as a duty upon it.

After some hesitation we have reached the conclusion that such an action will lie, and that this view will best carry out the design of the legislature in the enactment in question. The expressed purpose of the statute was "to facilitate the construction of railroads in the state of Missouri," and to this end it provided for the issue of negotiable bonds with coupons for interest attached. These were to be negotiated and sold, and as townships were not known to the law as corporate bodies, some provision must be made whereby payment could, if necessary, be enforced. The act met the difficulty arising from the non-incorporation of townships by directing the bonds to be issued in the "name of the county." By the legislation of Missouri, the county has a corporate or *quasi* corporate capacity, with limited power to contract and sue and be sued. (Wagner's Statutes, 407, 408.)

Jordan v. Cass County.

And the county as a civil subdivision or arm or agency of the state is under the supreme control of the legislature, except so far only as its power is limited by the constitution. It seems clear when the legislature directed the bonds to issue in the name of the county that it meant to give to the bonds additional legal value, and this intent should be carried into effect by the court so far as it is consistent with the provisions of the organic law. The theory of the act is to use the county and the officers of the county to effect the purposes of the enactment. Hence the petition for the election is required to be presented to the county court, which is the official organ of the county; the election is to be ordered by the county court, and by this tribunal, also, the subscription "in behalf of the township" is to be made, and bonds "in the name of the county," issued. The county court is to levy and cause to be collected the taxes to pay the bonds, and the sheriff of the county and the county treasurer are required to see to the collection, and application of the taxes. Thus we see the county and the county officers are the instruments employed by the legislature to give effect to the act under which the bonds were issued. There must have been a purpose in requiring the bonds to be issued in the *name* of the county; but the constitution will prevent any liability attaching to the county—that is, to the people of the county, for the payment of these bonds. The constitution, however, will not be infringed by allowing the county to be sued if the judgment which is rendered is one which is not to be satisfied out of the private property of the county, if it owns or can own any which is subject to execution, or by a tax upon the people or property of the county at large. It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued so far as is necessary to give effect to the rights of the holders of the bonds consistently with the provisions of the constitution. The right

Jordan v. Cass County.

of the non-resident citizen to resort to the courts of the United States is one which is given by the constitution and laws, and it is a right which a citizen would be apt to regard as specially desirable, where if he be compelled to resort to the state courts it must be to a county whose citizens in whole or in part are his real adversaries, and who may constitute the jury to decide the case. This right, so valuable to a plaintiff, but which deprives the defendant of no just advantage, since the federal courts are by their constitution to stand wholly indifferent between all parties, ought not to be considered as unavailable to a non-resident citizen unless a fair construction of the enactments applicable to the question so requires.

It is in our judgment practicable consistently with established legal principles to protect the constitutional rights of the counties, and at the same time to recognize the constitutional right of the non-resident citizen to come with these securities into court to have his rights in respect to them determined. This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county, but only a judgment judicially establishing the plaintiff's debt if no defense shall be successfully made. If the debt shall be thus established we must suppose that the proper county court will levy and collect from the property within the township, the necessary tax to pay the debt, but if it should not, this court has the power and in that event it would become its duty, by *mandamus*, to cause such tax to be levied and collected.

This view, in effect, makes the county a trustee for the township, which is one of the subdivisions of the county, and a necessary party to the action, but not the party personally liable for the payment of the debt which the plaintiff may establish; and such, by the act under which the bonds in suit were issued, is the real relation which is established between the county and the township.

Jordan v. Cass County.

This, it is to be remembered, is a law action, and the judgment to be rendered must be one which, so far as the anomalous legislation under review will admit of it, is consistent with the restricted powers and somewhat rigid rules of a common law court. The provisions of the state statutes warrant the kind of judgment which it is proposed to render, if the plaintiff shall recover: that is, such judgment as may be found necessary to effectuate the rights of the parties. (Wagner's Statutes, 1051, secs. 1, 2.)

But the common law adjudications show that the judgment may be moulded so as to conform to the rights of the parties under the law, and by analogy support the view we take. Thus, in *Peck v. Jenness*, 7 How. 612, where the plaintiff attached goods of his debtor before the latter was proceeded against in bankruptcy, and where, pending the action, the debtor was discharged; the supreme court of the United States held that it was competent and proper for the court to render a judgment, notwithstanding the discharge, for amount of the debt, damages and costs, "to be levied only of the goods of the defendant attached on plaintiff's writ, and not otherwise." "The books," says Mr. Justice GRIER, in this case, "are full of precedents for such a judgment. When an administrator pleads *plene administravit*, the plaintiff may admit the plea, and take judgment of assets, *quando acciderint*. When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the plea and have judgment, to be levied only of defendant's future effects." (7 How. 623.) So, subsequently, the supreme court held that when contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars (*Bronson v. Rodes*, 7 Wall. 229).

Upon the whole, our judgment is that the action is well brought against the county; that the county may make defense, but if the plaintiff shall be found entitled to recover, he may have judgment against the county for his debt,

Pollard v. Pleasant Hill.

damages and costs, to be enforced, if necessary, by *mandamus* against the county court, or the judges thereof, to compel them to levy and collect a special tax according to the statute in such case provided, and not otherwise.

KREKEL, J. concurs.

DEMURRER OVERRULED.

NOTE.—The principle that debts incurred by or in the name of a public or *quasi* corporation, under legislative authority, cannot under any circumstances be enforced against the private property of the inhabitants, has recently been decided by the supreme court of the United States, in the case of *Rees v. City of Watertown* (which went up from Wisconsin), 19 Wall. 107.

ISAAC W. POLLARD v. THE CITY OF PLEASANT HILL.

1. An innocent holder for value of negotiable municipal bonds is not bound to look further than to see that authority of law for their issue exists, and may rely upon the recital in the bonds that the preliminary conditions have been complied with by the municipal officers to whom the matter is confided by the legislation authorizing the issue of the bonds.
2. The *funding bonds* issued by the defendant city fall within the above principle.
3. The interest of authorized bonds may be made payable in gold.

(Before DILLON and KREKEL, JJ.)

Municipal Bonds.—Funding Bonds.—Defences.—Interest Payable in Gold.

ACTION on certain coupons originally attached to the negotiable bonds issued by the defendant city, under legislative authority. The bonds were of two classes: One issued in payment of stock in a railway co.; the other, as recited on their face, under the funding act of the state author-

Pollard v. Pleasant Hill.

izing municipalities to fund their indebtedness and issue bonds therefor. The nature of the defenses set up in the answer appears in the opinion of the court. The answer did not allege notice to the plaintiff nor deny that he was a holder for value.

For this reason the plaintiff demurred to the several counts of the answer.

Judson & Barnard, for the plaintiff.

Hall & Adams, for the defendant.

KENKEL, J.—This action is brought on detached coupons of two classes of bonds, the first on subscription of \$15,000 to the Pacific Railroad of Missouri; the second on bonds funding the debt of the city. Plaintiff claims to be holder for value before maturity.

As to the Pacific Railroad bonds and coupons, the answer sets up that the vote and ordinance authorizing the subscription were to the Pacific Railroad of Missouri in aid of constructing the Pleasant Hill and Lawrence Branch thereof; that the subscription was actually made to the Pleasant Hill and Lawrence Branch of the Pacific Railroad, and the bonds issued in payment thereof delivered to the St. Lawrence & Denver Railroad; that for not pursuing the authority, as cited in subscribing, the bonds and coupons are void. It is admitted by the pleading that the necessary two-thirds vote to authorize the taking of stock was had. The bonds on their face recite that they were issued to the Pacific Railroad.

An innocent holder is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, has been complied with. This has been the uniform decision of the supreme court of Missouri from the case of *Fagg v. The City of Palmyra*, 33 Mo. 440, to its last unreported

Pollard v. Pleasant Hill.

utterances in the Clark county case. Nor has the federal judiciary been wanting in its steadfast adherence to this doctrine. As late as the fifteenth Wallace, *Grand Chute v. Winegar*, 355, it has been re-asserted, and former cases affirmed.

As to the defense that the bonds are payable in legal tender notes, and that no authority exists to contract for gold coin in payment of interest, it is only necessary to refer to the case of *Tribblecock v. Wilson*, 12 Wallace, 687, to find the law as settled by the supreme court of the United States. It is there held that a contract may be made for gold coin or specie, and that such contract can not be satisfied by payment in legal tender notes. That a contract to pay bonds in legal tender notes and the interest thereon in gold coin can be made, it is apprehended will not be seriously questioned. It is a matter of contract purely, and when its conditions sufficiently appear, the court will enforce it. In this case the bonds call for six per cent interest, payable in gold coin, and the coupons conform to the bonds. No reasons are perceived why the contract thus specifically made for gold coin should not be valid and enforced. The demurrer to the second, third and fourth counts of the answer will therefore be sustained.

The second class of coupons sued on are on funding bonds, and the petition as to them alleges that they were issued in pursuance of an act of the general assembly of Missouri authorizing the funding of the floating debt of the city; that the bonds issued; that plaintiff became a holder for value before maturity, and that coupons were not paid on presentation.

The answer sets up that the bonds were not issued in payment of outstanding warrants, or in satisfaction of liabilities of the city, but that they were issued to raise funds to improperly influence legislation, quoting an ordinance of the city, from which it would appear that such was the case.

Aller v. Town of Cameron.

However much we may deprecate that any people should thus expose themselves on their own record, and swift as this court would be to visit proper punishment upon the heads of those who would contaminate the fountain of legislation (if a proper case and parties were before the court), it would be but aiding and abetting the wrongful acts to allow them to come and set them up in their own defense against innocent holders of the commercial securities they issued. It is admitted that legal authority to fund the floating debt of the city existed, and that the bonds on their face purported to be issued under and by virtue of it. This binds the city. The use made of the proceeds of the bonds can not affect holders for value.

The demurrer to second and third counts of answer, as to the second class, the funding bonds, will also be sustained.

DILLON, Circuit Judge, concurs.

JUDGMENT ACCORDINGLY.

NOTE.—As to the first class of bonds mentioned in the foregoing opinion see *Jordan v. Cass Co. post*.

H. M. ALLER v. TOWN OF CAMERON.

The town of Cameron was duly incorporated, but if it were not, the town having, as a corporation, voted and issued the bonds, it would be estopped in favor of a *bona fide* holder thereof for value to set up that it was not incorporated.

(Before DILLON and KREKEL, JJ.)

*Municipal Bonds.—Mis-location of Municipal Corporation.—
Estopped.*

ACTION on negotiable coupons originally attached to bonds issued by the town of Cameron under the corporate seal thereof to the Chicago & Southwestern Railroad Co. or bear-

Aller v. Town of Cameron.

er, upon a vote of the people of the town. It appeared on the trial that the town of Cameron was platted on part of section 23, and the plat was so recorded. In 1867, the people living on the ground thus platted presented, under the statutes of Missouri, a petition to the county court to be incorporated as a town, and their prayer was granted; but the order of the county court in incorporating "the town of Cameron," by mistake described it as in section 24, instead of section 23. Section 24 is a farm owned by Mr. Shirts. The town has grown to have 2,000 people; and ever since its incorporation it has maintained a municipal organization, and as such voted, and in February, 1871, issued the bonds in suit. It defended against the bonds, on the ground that it was not incorporated, or rather upon the ground that the legal corporation was in section 24, and that it—i. e., the corporation *de jure*—did not issue the bonds. There had never been any municipal organization in section 24.

Mr. Merryman and *Mr. Hall*, for the plaintiff.

Mr. Harwood and *Mr. Edwards*, for the town of Cameron.

DILLON, *Circuit Judge*.—This is certainly a novel case, but we are of the opinion that the defense to the coupons in suit must fail—

1. Because, taking the petition for the incorporation of the town of Cameron in connection with the plat of the town to which it refers, and which correctly describes the location of the town, and the law which authorizes the incorporation of a town, and not of a farm upon which there is no population, the order of the county court should be construed to refer to the town, (which was well known by its designation as the town of Cameron), and not to the land upon which there was no population. In other words, as either

Foster v. Callaway County.

the congressional description or the reference to the town is erroneous, the court, to effectuate the intention of the petitioners and the county court, and to prevent the mischief which would result from holding invalid all that has been done by the corporation since 1867, should reject as false the congressional description, and adopt the boundaries as given in the plat to which the petition referred—this being the construction which has ever since been put by the people of the town upon the action of the county court, and the construction declared to be correct by the county court in its subsequent order in 1872, correcting the record of its action in 1867.

2. We think, also, that the town, having ever since acted under this incorporation, and as such voted and issued the bonds in suit, by its officers and under its seal, it is estopped in favor of the plaintiff, or holder for value, to set up that it is not a corporation, and that the true corporation is upon the farm of Mr. Shirts, in section 24.

KREKEL, J., concurs.

JUDGMENT FOR PLAINTIFF.

THOMAS J. FOSTER v. CALLAWAY COUNTY.

1. The power conferred upon counties along the route of the Louisiana and Missouri River Railroad Company by the charter of that company of March 10, 1859, to subscribe for its stock without a vote of the people, was not taken away, as respects Callaway county, by the amendatory act of March 24, 1868.
3. The provisions of the state constitution as to aid to railways, amendatory acts and titles to acts, discussed.

(Before DILLON and KREKEL, JJ.)

Foster v. Callaway County.

Railway Aid Bonds. — Charter Privilege of Receiving Subscriptions without a Vote of the People.

THIS is an action upon coupons attached to bonds issued by the defendant to the Louisiana and Missouri River Railroad Company, or bearer, dated January 1, 1869.

The answer denies the authority of the county court of Callaway county to issue the bonds, and this denial rests upon the grounds mentioned in the opinion of the court. The cause was submitted to the court upon the pleadings, an agreed statement of facts, and the record of the county court of Callaway county in relation to the issue of the bonds. The plaintiff is admitted to be the owner of the bonds for value, without notice.

The defendant insists that the bonds were issued to the *south branch* of the Louisiana and Missouri River Railroad Company, under the act of March 24th, 1868, and not under the act of March 10th, 1859, both of which are referred to in the opinion of the court; and the defendant further insists, as there was no vote of the people as required by the constitution of 1865, and as no part of what is claimed to be the "*main line*" of the road is within the county of Callaway, that the bonds were issued without authority of law, and are void.

It is admitted that the county has paid interest on the bonds for 1870 and 1871, and has also paid a small part of the principal.

It is also admitted that no vote of the people of the county was had authorizing the subscription by the county court.

The bonds were made payable to the Louisiana and Missouri River Railroad Company or bearer, and contain the following recital:

"This bond is issued by Callaway county by authority of an act of the general assembly of the state of Missouri, ap-

Foster v. Callaway County.

proved March 10th, 1859, as amended by an act approved March 24th, 1868."

The other facts appear in the opinion.

J. D. Stevenson, and Ewing & Smith, for plaintiff.

O. Guitar, T. C. Reynolds, Lay & Belch, Jeff. Jones, Boulware & Flood, for the county.

Per Curiam: DILLON and KREKEL, JJ., concurring. — On the 10th day of March, 1859, the general assembly of the state of Missouri passed an act authorizing the organization of a railroad company under the name of the Louisiana and Missouri River Railroad Company, with a capital stock of three millions dollars, and granting it power to "mark out, locate, and construct a railroad from the city of Louisiana, in the county of Pike, by the way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsville, in Montgomery county, and the northern limits of the town of Mexico, in Audrain county, thence to the Missouri river, at the most eligible point on the line the most suitable and advantageous as regards distance, grade, cost of road, and permanent value of same."

In this act of incorporation power was given "the *county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and to invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county.*" No popular vote was required as a condition to the exercise of this power by the county courts. Before any subscription by Callaway county to the stock of the company, a number of the surveys of the route of the road had, according to the agreed statement of facts, been made, some of them running through Callaway county and

Foster v. Callaway County.

others through Boone and Howard, and not touching any part of Callaway county. On the 16th day of January, 1868, the county court of Callaway county appointed Thomas B. Harris "commissioner and agent of the county of Callaway to take stock in and subscribe to the capital stock of the Louisiana and Missouri River Railroad Company the sum of five hundred thousand dollars, being five thousand shares of one hundred dollars each, of said capital stock, said subscription to be paid by the issue of county bonds, * * * as may be required by said company during the progress of the construction of said railroad from some point west or southwest of the North Missouri Railroad, on either the Wellsville or Jefftown routes, as surveyed through said county through the city of Fulton [in said county], and by way of New Bloomfield [in said county], as near as practicable to the Missouri river." This subscription of five hundred thousand dollars by the commissioner thus appointed by the county was made by him on the books of the company on the same day (January 16, 1868), as appears by a recital on the records of the county. Three smaller subscriptions were afterwards made by the order of the county court to the stock of the Louisiana and Missouri River Railroad Company. The Louisiana and Missouri River Railroad Company, it is agreed, subsequently to the said 16th day of January, 1868, "located and built the road now operating, running from Louisiana, in Pike county, to Mexico, in Audrain county, and located and graded throughout, and partially completed, the road running from Mexico to Glasgow (in Howard county), on the Missouri river, and completed the road now running and operated from Mexico, in Audrain county, by way of Fulton, in Callaway county, through Callaway county, to a point therein on the Missouri river opposite Jefferson City."

The constitution of the state of Missouri in force at the time of the passage of the act of incorporation of the Lou-

Foster v. Callaway County.

isiana and Missouri River Railroad Company, on the 10th day of March, 1859, contained no provision restraining the legislature from authorizing subscriptions to railroads in any manner it saw fit, but the present constitution, which went into effect on the 4th day of July, 1865, contains this provision: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall consent thereto."

In reference to laws in force at the time of the going into effect of the present constitution of the state, it has this provision: "All statute laws of the state now in force, not inconsistent with the constitution, shall continue in force until they shall expire by their own limitations, or be *amended* or repealed by the general assembly."

In reference to the subject and title of laws, the present constitution has this provision: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

A further provision of the constitution is: "No act shall be revised or re-enacted by mere reference to the title thereof, nor shall any act be *amended* by providing that designated words thereof shall be struck out and others inserted in lieu thereof; but in every such case, the act revised or re-enacted, or the act or part of the act *amended*, shall be set forth and published at length, as if it were an original act."

With these constitutional provisions in force, the legislature, on the 24th day of March, 1868 (Laws of 1868, p. 97), which was *after* the subscription of \$500,000 by the defendant, undertook to amend the original act of incorporation

of the Louisiana and Missouri River Railroad Company, by increasing its capital stock, fixing the terminus of the road, authorizing the location and construction of a *branch* road, and granting power to carry into effect the provisions of the act. It may be proper, although not strictly necessary, to notice here one question discussed by counsel and by the state supreme court in the Saline county case (*State v. Saline County Court*, 51 Mo. 350), as to whether the act of March 24th, 1868, is an *amendatory* act; and as to this point, it seems to us only necessary to state that the amendment of 1868, aside from the title, repeats nearly the whole of the original charter, *verbatim*, embodying in it new provisions only, thus literally complying with the constitutional provision cited, requiring an *amendment* to be "set forth and published at length, as if it were an original act."

Looking thus at the amendatory act, it cannot, as we think, be held that the legislature undertook thereby to create by special act a *new* corporation, which, under the constitution (article 8, section 4), it was prohibited from doing.

As to the constitutional provision requiring that an act shall not relate to more than one subject, and that expressed in its title, our opinion is that the mischief sought to be provided against was the passage of acts having no title at all, a false title, or mixing up matters incongruous and having no relation to each other. The whole of the amendatory act embraces but one subject when viewed with reference to the matter in hand, viz: the building of a railroad, and this is sufficiently expressed in the title. With the question of the validity of the amendatory act, so far as it relates to counties *south* of the Missouri river, we have no concern, and pass no opinion, having to deal here with Callaway county, on the *north* side of the river, and in which a part of the Louisiana and Missouri River Railroad might, by the original charter of March 10, 1859, be located and built.

The question as to whether the legislature in 1868 had

Foster v. Callaway County.

authority to *amend* the charter of 1859 would seem to be settled by the constitutional provision above cited in respect to amending statute laws, as expounded by the supreme court of Missouri in the case of *The Cape Girardeau and State Line R. R. Co.* (48 Mo. 468), and the late case of *The State, ex rel. etc. v. Greene County* (54 Mo. 540). But we do not mean to be understood as holding that the power of *amendment* of charters would exist to the extent of conferring, by way of amendment, powers prohibited by the express provisions of the constitution of 1865.

Callaway county is undoubtedly on the line of the railroad as contemplated in the original charter, and hence the county court had the right to subscribe, provided any part of the road was within it. At the time of the county's subscribing the \$500,000 stock under the original charter and prior to its amendment, some of the lines of the route of the railroad had, in fact, been run through Callaway county, as admitted by the agreed statement of facts.

The order of subscription speaks of paying out the bonds as the work of construction progresses through the county.

The supreme court of Missouri has so repeatedly decided, under provisions such as those contained in the charter of the Louisiana and Missouri River Railroad, that the county courts had the right, unaffected by the constitution of 1865, to subscribe without submitting the question to the people, that it is not necessary to dwell upon the point, or do more than to refer to the late case of *Smith and Hall v. Clark County*, 54 Mo. 58, in which the former decisions are cited and affirmed; and to the still more recent case of *The State ex rel. etc. v. Greene County*, 54 Mo. 540.

Another question discussed by counsel relates to the effect of the recital in the bonds, which were made payable to the "Louisiana and Missouri River Railroad Company," or bearer, that the same were issued in conformity to the act of

Foster v. Callaway County.

the 10th day of March, 1859, and the amendatory act of March 24th, 1868. Under our view, the amendatory act did not create a new corporation, and we are inclined to think that it did not take away the power of the county court to subscribe for the stock as conferred in the original charter of the company, and that it should not be held to do so as respects the *bona fide* holder of bonds which purported on their face to be issued under the authority of the charter. And this view finds a very strong support in the decisions of the supreme court of the state affirming the power of the counties along both the main line and branches, to subscribe for the stock under the provisions of charters antedating the present constitution, in the Macon, Sullivan and Greene county cases.

As to the amendatory act calling the road running through Callaway county the "South Branch," after the main subscription had been made to the Louisiana and Missouri River Railroad to aid in building a road surveyed and afterwards built through Callaway county, this cannot affect the *bona fide* holders of the bonds.

From the evidence and the original charter of 1859, it would appear that the road, as now built through Callaway county, was the *main* line, or, at least as much the main line as the line farther west, which does not touch Callaway county. The limitation in the charter of 1859 of the capital stock to three millions, scarcely sufficient to build a road of a hundred miles, the direction of the road from Louisiana by way of Bowling Green, crossing the North Missouri Railroad west of Wellsville and east of Mexico, thus narrowing down as it were the objective points, all indicate that the nearest place on the Missouri river was in the minds of the originators of the road, as well as of the legislature when it passed the charter.

We have adverted to the nature and effects of the amendatory act because these subjects have been largely discussed

Foster v. Callaway County.

by counsel, and not because they are absolutely necessary to reach a conclusion in the present case. We place our judgment on this ground: The plaintiff is a *bona fide* holder of the bonds issued by the county. These bonds recite that they are issued by virtue of the power conferred upon the county by the original charter of the company of March 10, 1859, as amended by the act of March 24th, 1868. The act of March 10, thus recited, did give the power, and that power is not taken away by the amendatory act of 1868, but according to the decisions of the supreme court of the state, above mentioned, remains unaffected by the provisions of the constitution of 1865, requiring a popular sanction to such subscriptions. All of the subscriptions were made to the "Louisiana and Missouri River Railroad Company," the original corporation, and not to the branch mentioned in the amendatory act.

As there was legislative power in the county to make the subscription and to issue the bonds, and as the county court has exercised this power and issued the bonds which have found their way into the hands of the plaintiff, a *bona fide* holder for value, the decisions of the supreme court of the United States conclude the county from making the defense here attempted, and this whether the amendatory act be or be not void, and whether the county was or was not authorized to transfer the subscription to what is called the *South Branch*, or to apply the money raised by the sale of the bonds to the building of that branch.

It may be further remarked that the record of the county court shows that the proceeds of the bonds issued by the county were applied to the building of a road substantially along the line to which the subscription was made on the 16th day of January, 1868; that the work progressed thereby and the bonds issued from time to time; that the minor changes in the line of the road were assented to by the county court; that the road passes through the entire body

Foster v. Callaway County.

of the county, and is in full operation, and that two years interest and part of the principal of the bonds had been paid. Under these circumstances it seems to us that no one, familiar with the decisions of the supreme court of the United States upon the general question, and of the supreme court of Missouri to the effect that the power of the county court to subscribe without a vote of the people survived, unaffected by the constitution of 1865, can reasonably anticipate any but one result.

The case, in the aspect in which it is viewed by the defendant's counsel, presents some new questions, and it is certainly one of great moment to the county, as it involves in its consequences a liability of over half a million of dollars. We are relieved of much of the weight of responsibility we would feel by the consideration that our judgment is not final, and that the record can so easily be put in a shape to present the merits of the case for the decision of the supreme court of the United States. In our opinion the plaintiff is entitled to judgment.

JUDGMENT ACCORDINGLY.

NOTE.—In the case of *San Antonio v. Gould*, 34 Tex. 49, it was held that the charter of a railroad company, which contained a provision that the city of San Antonio might subscribe to the capital stock of the road, and issue its bonds in payment of the same, was obnoxious to that provision of the Texas constitution (art. 7, sec. 24) which provided that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." But the ruling is in direct conflict with *San Antonio v. Lane*, 32 Texas, 405—a suit upon the same securities—where the reverse was held in a well-considered opinion. And in order to reach the result arrived at, it was necessary to overrule not only *San Antonio v. Lane*, but also the still earlier case of *San Antonio v. Jones*, 28 Texas 19, where the same securities were likewise sustained.

McKee v. Vernon County.

LOGAN McKEE v. VERNON COUNTY.

The agent of the county and the presiding justice of the county court *substituted* engraved bonds, the signatures on the coupons of which were lithographed, for private bonds, the new bonds being of the same date and amount as the old, and the old being at the same time destroyed; there was no order of the county court for the substitution, but the county afterwards paid interest for two years, retained the certificate of stock, which was the consideration of the bonds, and entered of record other reasons than the substitution, for ceasing to pay interest on the new bonds: HELD that the plea of *non est factum* was not sustainable as a defense to an action to recover coupons on the new bonds.

(Before DILLON and KREKEL, JJ.)

Municipal Bonds.—Substitution of New Bonds for Old.—Estoppel.

THIS suit was for collection of interest coupons from bonds proved to have been executed by the presiding justice and clerk of the county court, and *substituted*, with the knowledge of the county agent, for other bonds regularly issued about seven months previously, which were surrendered and destroyed at the time of the substitution.

Plea, *non est factum*. Reply 1, in denial; 2, estoppel. It appeared in proof that the county held \$300,000 of railroad stock, and the railroad was built through the county. The defendant claimed that the surrender and destruction of the old bonds by their holders released the county, and the issue and delivery of new bonds without any order of the county court were without authority and that the bonds were therefore void. A jury was waived and the case tried to the court, whose decision orally announced, is given below.

Mr. Stephenson and Mr. Shippen, and Ewing & Smith, for the plaintiff.

Mr. Stone, Mr. Burton, Mr. Jackson, and W. P. Johnson, for the county.

McKee v. Vernon County.

DILLON, *Circuit Judge*.—This is an action brought against Vernon county on coupons attached to bonds issued under authority contained in the charter of the Tebo and Neosho Railroad Company, approved in January, 1860, which conferred on the county court power to take stock in such company and issue bonds in payment therefor. The county court made a subscription to the capital stock and issued bonds to the amount of three hundred thousand dollars. This action is on the coupons for interest upon some of these bonds. The defendant pleads *non est factum*, to which plaintiff replies by denial, and by setting up that the county is estopped, 1st, by its having levied taxes and paid coupons up to 1872, making two or three payments; and 2d, by having received a certificate of its stock from the railroad company, and still holding it; whereby the plaintiff claims the case is brought within the decision in 13 Wallace. (*Pendleton Co. v. Amy*, 13 Wall. 297.)

Upon the trial it appeared as follows: The county court made an order of subscription for the railroad stock, and appointed Mr. Birdseye, as the agent of the county, directing him to prepare the bonds, which were accordingly prepared and were issued under the order. The original bonds were *printed* and were signed by the presiding justice, and sealed with the seal of the county. The clerk was Hall, who had a deputy, Weyand. Hall being a dissipated man, Weyand attended to his duties and signed Hall's name with the knowledge of the presiding justice and of the county agent. These bonds did not receive favor because not printed in good style, and the county agent proposed to the presiding justice to *substitute engraved bonds for the printed ones*, and to this the presiding justice acceded. The old bonds were surrendered and destroyed by the presiding justice, as he testifies, and in January, 1871, new bonds were issued corresponding in terms and form with the old ones. Members of the county court had gone out of office and new members

McKee v. Vernon County.

had come in, and Hall, the former clerk, had gone out of office and Weyand had become clerk.

The substituted bonds bore the same date with the former ones, and were signed by the same presiding justice and the same clerk, and this was at the instance and in the presence of the county agent to whom the matter had been especially intrusted by the county court. As the new bonds were made to bear the old date, Weyand still signed the name of Hall, his predecessor in office, for whom he had been deputy, and the signatures on the coupons were lithographed. These bonds were delivered by the presiding justice to the county agent, who proceeded to carry out his instructions.

The county paid interest on these new bonds in 1871 and 1872, and there was evidence that the county received a certificate of stock in the railroad company, not produced at the trial, but remaining in the possession of the county. The county court ordered the subscription to be made, and the bonds to be executed by the presiding justice, and attested by the clerk and the seal of the county. The statutes of Missouri make no provisions as to the mode in which these securities shall be executed.

The only irregularities presented in this case are, 1st, the substitution of new for old bonds; and 2d, the signing by Weyand of Hall's name as clerk. The question is then, whether the plea of *non est factum* is supported by proof of these irregularities.

If the statute provided expressly the mode in which these securities must be issued, the question, in case of non-conformity with its requirements, would be more difficult. The bonds were ordered to be attested by the clerk, but what was done afterwards in levying taxes and payment of interest makes a waiver of that part of the order, and the county is now estopped in relation thereto.

These irregularities are not so great as in the Winnebago

McKee v. Vernon County.

case in Iowa, decided by the United States supreme court. (16 Wall. 6.) The county judge there issued bonds which were objected to in New York, and he, as county judge and agent in New York, more than 1,000 miles from his official residence, had a new county seal made, cancelled the old bonds and issued new bonds in substitution. The power of a county judge in Iowa is no greater than of the county court in Missouri. Here there are no checks on the judges, and no fraud is alleged, and the county suffered no wrong. The feature of the substitution is much worse in the Winnebago county case.

In reaching these conclusions our views are strengthened by the order made of record by the Vernon county court, declaring its reasons for not paying its interest. They were not the substitution of bonds, or the informality of execution, but solely on a ground not here taken in defense, namely, that the railroad company did not complete its main line according to contract. Again, we deem the acts and participation of the county agent of importance, and the county is to be held to know what he and the presiding justice knew. The failure to give notice of the special term of the county court is of no importance whatever.

The bonds recite their issue under the Tebo and Neosho Railroad charter, and if as we hold in this case they are the bonds of the county, no failure in the performance of duty on the part of the officers can affect the rights of *bona fide* holders.

We find for the plaintiff for the amount of his coupons, with interest from maturity.

JUDGMENT ACCORDINGLY.

NOTE.—In *Pennington v. Baehr*, July term, 1874, the supreme court of California decided that coupons may be signed by a printed *fac simile* of maker's autograph, although not expressly authorized by statute.

Meador v. Everett.

DANIEL F. MEADOR, *et al.* v. R. D. EVERETT, Assignee in
Bankruptcy of L. H. Clark.

The assignment, transfer and delivery of a lease by the lessor to secure a debt, is valid as against the assignee in bankruptcy of the lessor.

(Before DILLON, Circuit Judge.)

Lease.—Assignment by Lessor as Security.—Rights of such Assignee Against the Assignee in Bankruptcy.

Appeal in bankruptcy. In the bankruptcy proceedings against L. H. Clark, in the district court, the petitioners, Daniel F. Meador and his copartners, filed a petition in the nature of a bill in equity for the enforcement of a lien, to which the district court sustained a demurrer and dismissed petition.

The petitioners, Meador & Co. appeal from this action of the district court.

Their petition as filed in the district court, in substance states, that, in July, 1870, the complainants sold to L. H. Clark, one of the bankrupts, certain furniture to be used in his hotel at Kansas City, for the sum of \$6,731.90, for which said Clark executed six notes for \$1,000 each, payable in two, three, four, five, six and seven months from date, and one note for \$731.90, payable eight months from date; that the same having been proved against the estate of said Clark, that on the 1st of May, 1870, Clark executed a lease of said hotel to one J. C. Parks for five years; that Parks took possession of the property under the lease July 1st, 1870; that the lease was duly recorded July 8th, 1870; that on the 7th day of July, 1870, said Clark, to secure the payment of said notes, assigned, transferred and delivered possession of said lease to complainants with the consent of said Parks; that on the 6th of July, 1870, said Clark gave complainants a power of attorney to receive and collect the rents accruing to said Clark under the lease, until their debt should be paid, and

Meador v. Everett.

thereby authorized and empowered them to do and perform all in reference to said lease that said Clark himself could do; that on the 6th of July, 1870, as a further security, and a further recognition of the assignment of said lease from said Parks, said Clark drew his bill of exchange for \$6,731.-90 on said Parks, who accepted the same, thereby becoming liable for said debt, and agreeing to apply the rent of said building to its payment, as the same became due; that said Everett, as assignee, now has possession of said hotel; and that by reason of the premises complainants have a lien upon the rents of said hotel, and pray that the assignee be required to rent said hotel for — months, the proceeds to be applied to the payment of their debt, and for general relief.

W. B. Napton, jr., for the petitioners (appellants).

Lay & Belch, for the assignee in bankruptcy.

DILLON, *Circuit Judge*.—The bankrupt, owning a hotel, made a lease of it for five years to one Parks, reserving rent. Being indebted to the petitioners, the bankrupt, to secure them, it is alleged, “assigned, transferred and delivered possession of said lease to the petitioners, with the consent and sanction of said Parks, the lessee.” At the same time it is further alleged, that “the bankrupt executed to the plaintiffs a power of attorney to receive and collect the rents accruing under the said lease, and to do and perform all acts with reference to said lease that the said lessor himself could do.” And it is further alleged that lessee accepted the lessor’s bill in the plaintiffs’ favor for the amount of their debt against the lessor, said bill to be paid out of the rents as they fell due. No copy of the lease or assignment, or power of attorney is in the record, but according to the averments it must be taken that the assignment was in writing. In the absence of the written assign-

Meador v. Everett.

ment and instrument I can do no more than to indicate the legal rights of the parties upon the facts set forth in the plaintiff's petition.

If the transaction between the bankrupt and the plaintiffs gave to the latter any rights or equities in respect to the rents or the demised property, the assignee in bankruptcy takes the estate subject thereto. In this respect he stands precisely in the place of the bankrupt. Assuming the allegations of the petition to be true, they show in the plaintiffs, as against the bankrupt, such rights in respect to the rents or demised property as the law will recognize and protect. It is well settled that it is competent for the lessor to separate, by contract or devise, the rent from the reversion, retaining one and disposing of the other, or disposing of the rent to one person and the reversion to another. 1 Washb. Real Prop. 338, where many cases are collected.

Whatever the contract between the bankrupt and the plaintiffs shows the former disposed of to the latter, will be binding upon the former and his assignee in bankruptcy. In *Russel v. Russel*, 1 Brown Ch. R. 269, it was decided that the pledge of a lease by the lessor, by delivery, merely, was in equity a mortgage of the lease-hold estate as against the assignee in bankruptcy. Much more clearly would this be the case where there was an express assignment and delivery of the lease by the lessor to secure a debt. In *Ex parte Wells*, 1 Vesey, 162, Lord Chancellor THURLOW, said: "An assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."

The petition states a case which, *prima facie*, as to the demised estate puts the plaintiffs, so far as necessary to secure payment of their debt against the bankrupt, in the place of the bankrupt, and therefore the demurrer of the assignee ought to have been disallowed. The extent of the plain-

Conover v. Massachusetts Insurance Company.

tiffs' rights I can not determine in the absence of the lease, the assignment and power of attorney. I only hold that the petition makes a case giving, to some extent at least, a lien which the bankruptcy court should respect. I see no reason why the rights of the plaintiffs and assignee may not be well determined upon the petition of the plaintiffs.

The order sustaining the demurrer and dismissing the petition is reversed, and the district court directed to permit the assignee to answer the petition if he shall be so advised.

ORDERED ACCORDINGLY.

NOTE.—After the cause was remanded it was tried on its merits in the district court, which rendered a decree dismissing the petition of Meador & Co.; and on appeal this decree was affirmed on the ground that Meador & Co. failed to show any assignment or delivery of the lease to them, and because, by the statute of Missouri, assignments of leases are required to be in writing and to be recorded, or else are declared void as to all persons except the parties thereto, and persons having actual notice thereof. (1 Wagner's Stats. p. 277, secs. 24, 25, 26; *Ib.* p. 287, sec. 33; *Ib.* p. 655, secs. 2, 3.)

JOHN CONOVER, executor, etc. v. MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY.

1. Where no specific and distinct reference was made in the policy to the written application, the statements in the latter, although it referred to the policy, and contained a warranty, were considered as representations, and not as warranties. The recent leading cases on this subject cited.
2. Where the policy itself contains a condition that if the statements made by the applicant in the negotiations for the policy shall prove untrue, the policy shall be void, untruthful answers, to material questions relating to the health and habits of the assured, will defeat the right to recover thereon, though the matters misrepresented did not cause or contribute to his death.

Conover v. Massachusetts Insurance Company.

3. The act of the Missouri legislature of March 23, 1874, commented on and held not to apply to the case in judgment.

(Before DILLON, Circuit Judge.)

Life Insurance.—Warranty.—Representations.

THE defendant, through an agency in Missouri, issued a policy for \$5,000 upon the life of Eli Barnum, the plaintiff's intestate, dated June 10, 1871, and which stated that "this policy is made and accepted upon the following *conditions*: In case the statements made by, or on behalf of, or with the knowledge of, the said assured to the said company, as the basis of, or in the negotiations for, this contract, shall be found in any respect untrue, this policy shall be null and void."

The policy was issued upon an application therefor, dated May 27, 1871, signed by the applicant, and containing thirty-two special questions to be answered, and which were answered by him. The 7th question was, "Does the party use alcoholic stimulants?" Answer.—"No." 8th.—"If so, state how often? In what quantities?" Answer.—"None." 9th.—"Has the party at any former time used alcoholic stimulants?" Answer.—"No." 15th.—"Has the party ever had inflammatory rheumatism?" Answer.—"No." 17th.—"Has the party now, or has he ever had, an habitual cough?" Answer.—"No." In the application or declaration was the following: "And I do hereby agree that the answers given to the following questions, and the accompanying statement, and this declaration, shall be the basis and form part of the *contract* or policy between me and the company, and I warrant such answers and statements as true and correctly stated, and agree that if the same be not so in all respects, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits, shall be forfeited to said company."

Conover v. Massachusetts Insurance Company.

The last question was, "Is the party and the applicant aware that any untrue or fraudulent answers to the above queries * * will vitiate the policy and forfeit all payments thereon, and has he carefully read the questions and answers thereto?" To which he answered in writing, subscribed by himself, "Yes."

The assured died within one year after the date of policy, and this is an action by his executor to recover the amount insured by the policy. The company defends the action on several grounds, but it is only necessary to state those on which the judgment of the court rests. The company pleads that the statements in the application as to the health and habits of the assured are untrue in these several particulars; viz.: at the time of signing the application, and for years previously he had habitually used alcoholic stimulants; that he had had inflammatory rheumatism, and for years labored under an habitual cough. He did not die of rheumatism or any pulmonary disease, nor, so far as appeared, in consequence of the use of alcoholic drinks.

The action was tried by the court, a jury having been waived. Without recounting the evidence of the various witnesses adduced by the parties, it is sufficient to state that the witnesses on both sides all concurred in the statement that the assured was habitually given to the use of alcoholic drinks; that he not unfrequently became intoxicated, though he would often, for weeks at a time, not drink at all. He was in the army, as a lieutenant of the fifty-seventh Illinois regiment, and it is clearly proved that he had a severe attack of inflammatory rheumatism in 1862, so severe that he had to leave his regiment and be taken to the hospital. It is also shown that he labored under an habitual cough while in the army. On the other hand, there is testimony to the effect, that at and about the time of his effecting the insurance in question, his general health was good.

After his death, and after this suit was brought and an

Conover v. Massachusetts Insurance Company.

answer was filed, the legislature of the state of Missouri passed an act, approved March 23, 1874, as follows:

"Sec. 1. No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case, shall be a question for the jury.

"Sec. 2. In suits brought upon life policies heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same, shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent interest per annum from date of receipt."

Henry Flanagan, John Conover, and W. S. Everett, for the plaintiff.

H. K. White, for the defendant.

DILLON, *Circuit Judge*.—Much of the discussion at the bar was directed to the point whether the statements in the application concerning the health and habits of the assured were, under the language of the policy in connection with the language of the application, to be considered as *warranties* as maintained by the defendant, or *representations* as maintained by the plaintiff. It was not seriously denied by counsel that these statements were not true in point of fact, and hence if they are warranties, it is plain the plaintiff has no case. The plaintiff's position was that the statements were not part of the policy by insertion therein, or by distinct and specific reference in the policy itself to the application as part of the policy, and hence these statements in the

Conover v. Massachusetts Insurance Company.

application could, at most, only be representations ; and being such, it was further claimed by the plaintiff that their untruthfulness, although relating to matters material to the company, on preliminary inquiries, were, in fact, as the event showed, immaterial, since the death was not caused by the diseases or habits to which the untruthful answers related.

Inasmuch as the *policy itself* does not distinctly identify and refer to the written application and make it part of the policy, I am inclined, in view of the established and reasonable rule, that warranties are not to be created or extended by construction, and the doctrine of the later and best considered cases, to hold, that the statements in the application are representations and not warranties. *Campbell v. New England, etc. Ins. Co.* 98 Mass. 381, 1867 ; followed in *Price v. Phoenix Ins. Co.* 17 Minn. 497, 1871 ; May on Insurance, secs. 164, 165.

As this is the view most favorable to the plaintiff, the case will be decided on the assumption that it is correct.

It will be seen by reference to the statement of the case, that the policy itself contains a condition that if any "statement made by the assured to the company, as the basis of, or in negotiation for, this contract shall be found in any respect untrue, this policy shall be null and void ;" and in the application the statements therein contained, "shall," it is declared, "be the basis and form part of the contract or policy" to be entered into between the parties. In the application the applicant declared that he had carefully read the questions and his answers to them, and that he was aware that if any of the answers were untrue or fraudulent, it would vitiate the policy.

The representations upon which the company grounds its defense, relating as they do to the habits of the assured, in respect to the use of alcoholic stimulants, then and previously, and to whether he had ever been afflicted with in-

Conover v. Massachusetts Insurance Company.

flammatory rheumatism (which it is well known often leads to fatal diseases of the heart), or had ever had an habitual cough (known to precede or indicate pulmonary diseases), were material, to enable the company or medical adviser to form an accurate opinion as to the risk which the insurer was asked to assume. Now the policy itself contains the express provision, that if the statements of the assured, in the negotiations for the policy, shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them; and if the representation shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them; and the case is governed by and falls precisely within *Anderson v. Fitzgerald*, 4 House of Lords Cases, 484, 1853, in which eleven of the judges of England attended the summons of the House of Lords, and where the unanimous judgment was, in a case like the present, that it was erroneous to leave it to the jury to say whether certain answers were material as well as false, and if not material to direct them that the plaintiff was entitled to recover. It was expressly decided that by the contract of the parties, the truth of the representations and not their materiality were alone in question, and if untrue, the insurer was not liable. That decision was followed in *Cazenove v. British Ass. Co.* 95 Eng. Com. Law, 437, 1859, and by the leading case of *Campbell v. New England, etc. Ins. Co.* 98 Mass. 381, 403, and in the well considered judgment in *Price v. Phoenix, etc. Ins. Co.* 17 Minn. 497.

These cases hold that where the insurer puts specific questions touching the risk, under conditions like those here agreed upon, the inquiries are conclusively made material and that false answers avoid the policy. It is not necessary in the case at the bar to go to the extent of affirming that *all possible* questions and answers are material, or may be made so, for here it is manifest that the questions, upon the answers to which the defense is based, pertaining to the

Conover v. Massachusetts Insurance Company.

habits of the applicant, in a matter material to health and to diseases he had had or was liable to have, were reasonable, and correct answers to which were essential, that the risk to be assumed by the company might be understood. In *Anderson v. Fitzgerald, supra*, Lord Chancellor CRANWORTH observed, that "Whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open for them to do so, and his false answer will then avoid the policy. Now it appears to me, my lords, that this is precisely what has been done here. The question for the jury to decide was simply whether it (the answer) was false or not. In that narrow compass the whole case lies."

I cannot refrain from observing, that it may be questionable whether the practice of the companies is, after all, so entirely reasonable, as it appeared to the Lord Chancellor. Life insurance has grown to such immense proportions as to have important public relations. It is the method which has been largely adopted to make provision for wife and children, and for those dependent upon the life of the assured. The judgments of courts touching the validity of policies cannot be too carefully considered, so as not to work injustice either to the insurer or the insured. Courts, by a too liberal extension of the doctrine of warranties, and by recognizing the validity for provisions of forfeiture of the rights of the assured, and particularly in allowing the parties, by sweeping language, not fully understood or considered by the assured, when the policy is effected, to make

Conover v. Massachusetts Insurance Company.

immaterial questions and answers material, have, in my judgment, inclined too much in favor of the companies, and hence the judicial tendency of late is to uphold, rather than overturn the contract, when substantial justice requires it.

In view of the fact, that the tables upon which the expectation of life is calculated, give the average mortality of persons as they run, while the companies select their risk, so that the actual mortality falls below the assumed mortality, and in view of the practice of the companies to put a multitude of questions to the applicant, and to make correct answers to all of them material, I am inclined to consider the legislation of Missouri as well-timed and necessary to prevent the unfair practice of the companies in framing their policies, though it is perhaps too broad, if it prevents the companies from providing that *wilful* misrepresentation as to material facts will avoid the policy, although it may chance that the misrepresented matters did not actually contribute to the death of the assured. But as the act does not apply to the case in hand, I forbear further remarks upon its policy or meaning.

As the questions in this case were material, and the answers untruthful in material respects, and as the parties, in the policy itself, agreed that this should vitiate the policy, the judgment must be for the defendant.

JUDGMENT ACCORDINGLY.

NOTE.—In substantial accord with the foregoing opinion is the following case tried at the Minnesota circuit, January 7, 1874, before NELSON, J. which we insert in this place:—

H. W. CONVER, Admr. etc. of John Hope, deceased, v. THE PHOENIX
MUTUAL LIFE INS. CO.

Action on a Life Insurance Policy.—Application for Policy.—False Representations in Obtaining.—As to Health and Diseases.—Effect Of.—Burden of Proof.—When Representations are Not Material or Intentionally Untrue.—Suppression of Facts.

Conver v. Phoenix Insurance Company.

THERE was evidence given to show that Hope, whose life was insured, was stricken down on the night of December 27, 1871, and remained in an apparently unconscious state for some time. Physicians were called to attend him. He recovered, and was up and about his business the next day. Evidence also disclosed the fact that two or three of these attacks, less severe, occurred some weeks previous; and that after the insurance was effected, attacks of a nervous character were more frequent, when the deceased would call for some one to hold his wrists, and would lie down upon his back, partially unconscious. These attacks were about five minutes each in duration.

Hope, on January 2, 1872, made application for life insurance, and a policy for the sum of \$5,000 was issued. He did not disclose these attacks to the defendant, but made answers to the questions propounded to him, as stated in the charge of the court to the jury.

There was also evidence to show that these attacks were vertigo, slight dizziness or fainting fits of a nervous character and not severe. Hope died May 29, 1872, of "chronic cerebritis."

It appeared also that, in the opinion of one of the physicians who attended him December 27, 1871, this attack was owing to some disease of the brain.

Gordon E. Cole and Harvey Officer, for the plaintiff.

Bigelow, Flandrau, & Clark, for the defendant.

NELSON, J. charged the jury.—Contracts of life insurance are made upon the application of the party whose life is insured, or upon the application of the assured named in the policy. The application is usually accompanied by answers to certain interrogatories propounded in writing by the company, and when not actually or constructively embodied in the policy of insurance, but in a collateral paper, are called representations. These representations are in this case, by the agreement of the parties, made a part of the contract, and it is stipulated in the contract that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue * * * this policy shall be null and void." When the assured consented that the contract should be based upon the truth of the statements or answers made to the questions in the application, there can no question arise for the consideration of the jury as to their materiality. The company may show that they are simply untrue, and if that is done the right of plaintiff to recover is defeated.

The defense in this case is directed to proof that the answers to the following questions in the application were false and untrue:

Conver v. Phoenix Insurance Company.

8th.—“What is the present state of the party's health?” Answer.—“Good.”

14th.—“Has the party ever had any of the following diseases: Apoplexy, paralysis, fits, etc.?” Answer.—“Scarlet fever when a lad; no other so far as I know.”

19th.—“Has the party had during the last seven years any severe sickness or disease; if so, state the particulars, and the name of the attending physician or who was consulted and prescribed?” Answer.—“No.”

20th.—“Is the party now afflicted with any disease or disorder of any kind, and if so, what?” Answer.—“No.”

Mutual good faith is required in contracts of insurance, and in life insurance particularly it is requisite that a frank and truthful statement should be made by the applicant. The company must rely upon the information obtained from him, and the correctness of the information given is the basis of the contract. I agree with those authorities which hold that these declarations are representations; but when they are made a part of the contract, and the untruth of any of them is set up as a defense, the burden of proving it is upon the company; and if the answers are shown to be simply untrue, the plaintiff can not recover.

The 14th question obtained an answer, that the applicant was in “good health.” This I think means that in the ordinary sense of the term, the applicant was free from any “apparent sensible disease, or the symptoms of them, and that he was unconscious of any derangement of the functions by which health could be tested;” in fact, that he was in a good state of health.

Should you believe from the testimony that the applicant, at the time he made this statement, was not in good health, as above stated, or if Hope knew of any symptom of disease which he did not disclose, then the plaintiff can not recover.

By the 14th question, the attention of the assured was called to certain diseases therein mentioned, and was asked if he had any of those diseases. He answered, “Scarlet fever when a lad, and none other that I know of.”

The 19th question was put to him: “Have you had any severe sickness during the last seven years? If so, give the particulars, name of attending physician, and who was consulted, and what was prescribed.” The answer was, “No.” To the 20th question the answer was also, “No.” It is urged that these answers were untrue; for the assured concealed the fact that only seven days previous he had been prostrated, and remained for some time in an unconscious state, and the attack was so severe that two physicians were called by his friends to attend him, and also that similar attacks, less severe, had been frequent. Now it is

Conver v. Phoenix Insurance Company.

for you to determine from the testimony whether the attacks about which the physicians have enlightened you was a disease specifically mentioned in the 14th question, or such a sickness as is contemplated by the 19th question, and in reference to which the company is entitled to know all the particulars, the names of the attending physicians, and any information which would afford it an opportunity of accepting or rejecting the application. It is not for you to decide whether the statements made to these questions in the application were material or not to the risk. The company, in making these inquiries, implies that it considered the representations material, and it will be relieved from the contract if the answers are untrue. The assured agreed that the representations should form part of the contract, and if untrue in any respect the policy should be void, and he must be bound by it. Whether they were intentionally untrue is also immaterial, if, in fact, they were untrue; for the contract of the parties is based upon the correctness of the answers, and to avoid the policy it is not essential that the applicant knew they were untrue. So far as the specific questions are concerned, the company was entitled to true and correct answers to them, and if untrue the policy is void; but in regard to information upon matters to which the attention of the applicant was not specifically called, the suppression must be of such facts as might render the insurance of the applicant's life unusually hazardous. It is for you to say, therefore, whether the condition of the applicant's health is shown by the evidence to have been such as indicated disease of some kind. A mere slight temporary disturbance, unless presenting characteristics of a dangerous disease, would not ordinarily avoid the policy; but information of repeated and frequent physical disturbances should be given to the company at the time of the application—good faith requires this—and the suppression of the information would be withholding facts material to the risk, and would avoid the policy. You are to say whether there has been such suppression on the part of the applicant in this case. You are to determine also, from the whole evidence, whether the defendant has established the untruth of the statements; and in considering this question you will, I know, freely and impartially decide the issue without any prejudice. The defendant, although an insurance corporation, is entitled to the same rights as a natural person—no less, and no more.

(The jury rendered a verdict for the plaintiff.)

Kappner v. St. Louis & St. Joseph Railroad Association.

J. G. KAPPNER, Assignee of the St. Louis & St. Joseph Railroad Company v. ST. LOUIS & ST. JOSEPH RAILROAD ASSOCIATION.

A company was organized as a corporation under the general laws of Missouri whose declared object was "the completion and ownership" of the St. Louis & St. Joseph Railroad; the president and vice president of this railroad company were secret members of the above association; a mortgage was made by the railroad company to the said association: *Held*, considering the trust relations between the parties and the effect of giving judicial sanction to the mortgage, that it was constructively fraudulent; but the association was allowed to prove in bankruptcy their advance to the railroad company as an unsecured debt.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Fraudulent Mortgage.

THIS is an appeal by the defendant from so much of the decree of the district court in bankruptcy as declares void a *second* mortgage held by them upon the St. Louis & St. Joseph Railroad, and cancels the \$1,000,000 of bonds secured thereby. There is also a cross-appeal by the assignee in bankruptcy from so much of the decree as allowed the defendants, \$392,511.62 as an unsecured debt against the estate of the bankrupt railroad company.

B. F. Stringfellow and *H. K. White*, for the assignee.

John R. Shepley and *John B. Henderson*, for the defendants.

DILLON, *Circuit Judge*.—In a cause of this importance I should ordinarily deem it proper to state my views as to the rights of the parties with some fullness; but the careful statement of the facts by the district judge (which, in argument, the counsel on both sides concede to be correct), and his opinion thereon, with the conclusions of which I con-

Kappner v. St. Louis & St. Joseph Railroad Association.

cur, render it unnecessary to go into the case at length. Looking at the history of the transaction, the objects of the defendants, as declared in their articles of association, viz: "The completion and ownership" of the railroad and the nature of the agreement made between the president of the railroad company (who, together with the vice president, were secret members of the defendant association), in execution of which the mortgage, whose lien is now sought to be enforced, was made, my opinion is that as against the assignee in bankruptcy (who represents alike the rights of the railroad company and of its creditors) the lien can not stand in equity as against the creditors of the railroad company.

I have less hesitation in reaching this conclusion, because until comparatively a late period in the transactions the defendants never contemplated getting a lien which would defeat the creditors of the company, but contemplated advancing money enough to pay off all the debts of the company. Whether the effect of the bankrupt act upon the transaction would not lead to the same conclusion, it is not material to inquire.

In respect to the appeal of the assignee: That the defendants actually advanced in money the \$392,511.62 to the railroad company is not disputed; and of course they should be allowed to prove the amount against the company's estate in bankruptcy, unless some rule of law forbids it. While the transactions between the officers of the railroad company and the defendants were constructively fraudulent by reason of the trust relations, and the effect on the company and its creditors of giving judicial sanction to it, yet I fail to see any equity in the view which would deprive the defendants of the right to prove the amount of their actual advances; and considering the date of the agreement between the parties and the time when the railroad company was proceeded against in bankruptcy, as well as the nature of the agreement, I do not think the bank-

Hamilton v. The National Loan Bank of St. Louis.

rupt act disentitles the allowance on the ground that the defendants took the mortgage for the purpose of obtaining an illegal preference. The decree is in all respects affirmed—the costs of the appeal to be paid by the assignee.

AFFIRMED.

NOTE.—The decision was acquiesced in by the parties and cross-appeals to the supreme court, which had been allowed, were not prosecuted.

H. B. HAMILTON, Assignee in Bankruptcy of the Lexington & St. Louis Railroad Company, Appellant, v. THE NATIONAL LOAN BANK OF ST. LOUIS and M. W. WITHERS, Appellees.

1. The assignee in bankruptcy takes the property of the bankrupt subject to all legal and equitable rights thereto existing in favor of third persons, at the time of the bankruptcy.
2. This principle applied to a case where the bankrupt sold six out of twenty specific bonds of like character and value, in the hands of a bailee, and received pay therefor before the bankruptcy; and it was held that the rights of the purchaser of the six bonds were superior to those of the assignee in bankruptcy of the vendor.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Legal and Equitable Rights of Third Persons in the Property of the Bankrupt.—Sale of Chattels Not Set Apart.

THE county of Lafayette, in Missouri, in April, 1871, subscribed \$20,000 to the stock of the Lexington & St. Louis Railroad Company, and to pay for the same executed twenty negotiable bonds of the same date, May 1st, 1871, payable at the same time, with the same rate of interest, for one thousand dollars each, and numbered from 71 to 90, inclu-

Hamilton v. The National Loan Bank of St. Louis.

sive. By agreement between the county and the railroad company these bonds were placed in the hands of M. W. Withers, in escrow "to be delivered by him to the railroad company upon the completion of its road, ironed, equipped, and in running order, and operated into the city of Lexington, in said Lafayette county, from Sedalia." There was no other condition attached to the delivery of the bonds, and the bonds themselves were fully executed and ready for delivery on the completion of the road to place named. When the bonds were put in the hands of Withers, as the agent or trustee for both parties, he executed to the railroad company a bond conditioned to deliver to said company or its order said twenty bonds of the county on the completion of the railroad to the city of Lexington. The twenty bonds were exactly alike, and only distinguishable from each other by difference in the numbers.

Soon afterwards, viz : On the 29th day of May, 1871, the president of the company sold six of the said twenty bonds to the National Loan Bank of St. Louis for the full value thereof, and received payment therefor, and as evidence of such sale delivered to the bank the aboved mentioned bond of Withers to the railroad company.

In April, 1872, the bank notified Withers that it had purchased of the railroad company six of the bonds in his hands. In April or May, 1872, the railroad was completed to Lexington and the company had fully complied with the condition which entitled it as against the county to the twenty bonds. Withers has ever since been in the possession of the twenty bonds and now holds the same.

On the 30th day of May, 1872, one John Reid, claiming to own the same, demanded of Withers "the fourteen bonds issued to the Lexington & St. Louis Railroad Company by the county of Lafayette, dated May 1st, 1871, numbered from seventy-one to eighty-five." The contract of sale by the railroad company to the National Loan Bank of St.

Hamilton v. The National Loan Bank of St. Louis.

Louis of the six bonds above mentioned in the hands of Withers did not designate by number, letter or otherwise, which of the twenty bonds the said bank was to get. Withers had only the twenty bonds in his hands.

After the completion of its road to Lexington, the railroad company was put into bankruptcy; and this suit is a contest between the assignee in bankruptcy of the railroad company and the National Loan Bank of St. Louis, as to the right of the respective parties to the six bonds in the hands of Withers purchased by the bank of the company in the manner above described.

The case arose in this manner. One Blair sued the railroad company before its bankruptcy in one of the state courts, and garnished Withers. Under the statutes of Missouri (1 Wagner's Stats. p. 192, sec. 52; *Ib.* 665, sec. 9; *Ib.* 664, secs. 1, 4), the National Loan Bank intervened by means of a proceeding termed an "interplea," and claimed the six bonds in the hands of Withers under its said purchase, which was prior in date to Blair's garnishment. Afterwards the railroad company was put into bankruptcy in the United States district court for the western district of Missouri, and by the *consent* of Blair and the assignee in bankruptcy of the railroad company and the National Loan Bank, the case of Blair and the "interplea" of the bank were transferred to said federal district court for trial and final disposition. Blair's attachment was dissolved by the federal district court, which left the contest as to the six bonds between the bank and the assignee in bankruptcy, remaining.

The parties waived a jury and tried the question to the court, and after hearing the evidence the court, upon the issues joined, found for the bank, and entered the following judgment, viz: "That M. W. Withers (who had answered in the proceeding), commissioner of Lafayette county, who has in his possession twenty of the bonds of that county,

Hamilton v. The National Loan Bank of St. Louis.

deliver six of the same to the interpleader, the National Bank of St. Louis, and that the assignee in bankruptcy pay the costs."

To reverse this judgment or order the assignee brings the case to this court.

Lay & Belch, and *H. B. Hamilton*, for the assignee in bankruptcy.

H. C. Wallace, *Ewing & Smith*, and *J. L. Smith*, for the National Loan Bank.

DILLON, *Circuit Judge*. — It is very doubtful whether this case is properly before the court upon the *appeal* of the assignee, or whether any errors of law appear of record properly saved by bill of exceptions or special findings of fact. But as counsel have made no questions of this kind, and have argued the case in this court upon the merits, and as upon the merits it must be affirmed, I will dispose of it upon the assumption that it is rightfully here and that the material facts are those appearing in the statement of the case.

This is a contest between the bank and the assignee in bankruptcy of the railroad company. Before the bankruptcy of the company the bank had purchased of it six of the twenty bonds of the county of Lafayette, then in the hands of Withers. The bank paid the company in full therefor, and the *bona fides* of the transaction is not impeached. But the company could not then deliver the bonds to the bank because they were in the hands of Mr. Withers, and because it had not then completed its road to Lexington. Afterwards the bank gave notice to Mr. Withers of its purchase of the six bonds, and in April or May, 1872, the company completed its road to Lexington, thus becoming fully entitled to the bonds, as between it and the county. All this occurred before the bankruptcy of the company. The twenty bonds are still in the hands of Mr. Withers, who

Hamilton v. The National Loan Bank of St. Louis.

claims no interest in them, and is ready to abide the orders of the court.

The assignee in bankruptcy relies upon this point, viz: That the purchase of the six bonds by the bank is void because the particular six of the twenty which it purchased were not determined by any description thereof, or by separating them from the residue, and therefore, it is argued, the title or property in the six bonds did not pass to the bank, but remained in the company.

As the bonds were all exactly alike in date, amount, time of payment, etc., there are not wanting respectable authorities that the title or property in six of the twenty would pass without any actual separation of them from the others. *Kimberly v. Patchin*, 16 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 118; *Young v. Miles*, 20 Wis. 615, 28 Ib. 643; *Chapman v. Shepard*, 39 Conn. 413; *Pleasants v. Pendleton*, 6 Rand. (Va.), 473; *Waldron v. Chase*, 37 Maine, 414; *Warren v. Miliken*, 57 Maine, 97; *Cushing v. Breed*, 14 Allen, 380.

The authorities, however, are not harmonious on the point, and will be found very fully collected in the American Edition of Benjamin on Sales (secs. 78, 81, 308, 318, 355).

It is not necessary to the determination of the present case to decide whether the legal title to the six bonds passed, or could pass, to the bank before the particular six were identified, set apart, or appropriated under the contract.

At the very least the contract between the company and the bank would be valid as an executory agreement on the part of the company, for a consideration actually received, to sell and transfer six of the twenty bonds, in the hands of Withers, to the bank; and this agreement having been made in good faith and the bonds having been paid for by the bank, gave to the bank a right or equity as against the company or its assignee in bankruptcy, to six of the twenty bonds. This right or equity would attach directly to the

Hamilton v. The National Loan Bank of St. Louis.

bonds in the hands of Withers, and could be enforced against the company if bankruptcy had not supervened, and it is not defeated by the subsequent bankruptcy of the company, to whose rights, and to whose rights only, in this respect, does the assignee in bankruptcy succeed. If the railroad company afterwards sold the remaining fourteen bonds to Reid, and designated the fourteen, leaving six, and only six, in the hands of Withers for the bank, this would amount to an appropriation of the six or a separation of them, and the title of the bank would be unquestionably complete.

In short, if the legal title to the six bonds passed to the bank, the assignee in bankruptcy of the vendor has no right to them. But if the absolute property in the six bonds did not pass to the bank the transaction gave to the bank a consummated and specific right or equity to six of the twenty bonds which are yet in the hands of the bailee, and this right or equity is recognized and preserved to the bank by the bankrupt act. Actual delivery of the bonds at the time of the sale is not necessary, for, says WILLES, J. in *Meyerstein v. Barber*, Law Rep. 2 C. P. 38, 51: "Since the judgment of Lord WENSLEYDALE (then Justice PARKE), in *Dixon v. Yates*, 5 Barn. and Ad. 313, it has never been doubted that by the law of England the sale of a specific chattel passes the property to the vendee, without delivery" (Benjamin on Sales, sec. 308; *How v. Taylor*, 52 Mo. 592; *Mossman v. Holcher*, 49 Mo. 89). And in equity, "A contract for the sale of chattels, to be afterwards acquired, transfers the beneficial interest in the chattels as soon as they are acquired to the vendee." [*I b.* sec. 81, and cases cited. *Frazier v. Hillard*, 2 Strob. (S. C.) 309; Story Eq. Jurisp. (10th ed.) secs. 421 b, 421 c, 1040.]

In the case under consideration the railroad company had already paid the county for the bonds by its stock, and was entitled to the bonds in the hands of the custodian thereof

Sherrard v. Lafayette County.

as soon as its road was completed to a given point; clearly it could transfer the beneficial interest in bonds thus held, and it did so by the sale to the bank, if indeed it did not pass the title to them, which became perfect and absolute when the road was finished and operated to Lexington. But whether the bank has the legal title or only the beneficial or equitable title, in either event its rights are superior to those of the company or its assignee in bankruptcy.

AFFIRMED.

JOSEPH L. SHERRARD v. LAFAYETTE COUNTY.

The bonds in suit held void in the hands of a *bona fide* holder, for want of legislative authority to issue them.

(Before DILLON and KREKEL, JJ.)

County Bonds.—Legislative Authority.

THIS case came on for trial upon the declaration, answer and reply thereto, and upon the facts as admitted by the pleadings, and as stipulated by the parties.

The case being thus submitted, the court specially found the facts to be as follows, to-wit:

1. The plaintiff's action is on bonds and coupons amounting to \$2,640 and interest thereon; these bonds were issued and delivered by the defendant to the Louisiana & Missouri River Railroad Company, to pay the subscription of defendant to the capital stock of said railroad; said bonds are dated June 9, 1869, and were executed and delivered about the date last named, and are of the following tenor, to-wit: "No. 5. State of Missouri. \$200. Lafayette county bonds. Five years after date the county of Lafayette promises to pay to the Louisiana & Missouri River Railroad Company, or bearer, the sum of two hundred dollars, with interest thereon from date hereof, at the rate of ten per cent per

Sherrard v. Lafayette County.

annum, which interest shall be payable annually on the presentation and delivery at the office of the treasurer of said county, of the coupons of interest attached. This bond being issued under and pursuant to an order of the county court of Lafayette county, and by authority of an act of the general assembly of the state of Missouri, incorporating the Louisiana & Missouri River Railroad Company, and authorizing the county courts of counties through which said road passed to subscribe to the capital stock of said railroad company, and to issue bonds of such counties in payment of such subscription, approved March 9, 1859, and an amendatory act thereto, approved March 14, 1868.

"In testimony whereof, the said county of Lafayette has executed this bond by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and by the clerk of said court, under order thereof, attesting the same and affixing hereto the seal of the court; this done at the city of Lexington, county of Lafayette, aforesaid, the 9th day of June, 1869.

"Ninian W. Lattvie, presiding justice of the county court of Lafayette county.

"Attest: Wm. Hixon, clerk of the county court of Lafayette county, Mo."

2. Said bonds were issued pursuant to an order of the county court of Lafayette county, and by authority of an act of the Legislature of Missouri, entitled "An act to incorporate the Louisiana & Missouri River Railroad Company," approved March 10, 1859, and by authority of an amendment thereto, entitled "An act to amend an act entitled an act to incorporate the Louisiana & Missouri River Railroad Company by increasing the amount of the capital stock of said company, defining more explicitly the power of the board of directors, to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers

Sherrard v. Lafayette County.

to carry into effect the several objects contemplated by this charter, and also by striking out sections 11, 18, 27, 30 and 31 of said act," approved March 24, 1868.

3. The plaintiff is a citizen of West Virginia, and he bought the bonds and coupons in suit for a valuable consideration before due, and is an innocent holder of the same for value without notice or knowledge of any irregularity in the subscription or issue of said bonds, except as may appear upon their face and such as he was bound in law to take notice of, and is now the owner and bearer of the same, and that defendant at different times for several years paid the interest on these bonds as they fell due.

4. By the original charter of the company, to-wit: The act of March 10, 1859, recited in the bonds in suit, the line or route of said company is confined to the *north* side of the Missouri river, and by the said original charter the said company could in no event locate its line or route or any part of the same in any county *south* of the Missouri river, and the right of counties to subscribe to the stock of said company by said original charter is expressly confined to those counties in which a part of the route of said railroad might pass or be located.

5. The defendant county is, and since its organization always has been *south* of the Missouri river and not within the limits of the original charter of said railroad company, of March 10, 1869 (*State ex rel. v. Saline County*, 51 Mo. 350; *State ex rel. v. Callaway County*, 51 Mo. 395).

6. The railroad of said company, although surveyed in the defendant county, was never constructed therein or south of the Missouri river, under the original charter or under the amendatory act of March 24, 1868, recited in the bonds in suit, but of this fact the plaintiff had no knowledge when he purchased the bonds.

7. The bonds were issued without the question of their issue ever being submitted to the voters of the people of the

Young v. Ridenbaugh's Administrator.

defendant county as required by section 14, of article 11, of the constitution of the state, which went into effect July 4, 1865, and no such election was held and no attempt to hold such an election was made.

Ewing & Smith, for the plaintiff.

Rathburn & Graves, for the defendant.

DILLON, *Circuit Judge*.—The defendant county is south of the Missouri river and not within the limits of the original charter of the railroad company, and under the constitution of the state (art. 11, sec. 14) and the decisions of the supreme court of the state referred to in the statement of the case, we are of opinion that the county had *no legislative authority* to issue the bonds.

KREKEL, J., concurs.

JUDGMENT FOR DEFENDANT.

WILLIAM YOUNG, *et al.* Petitioners, v. WILLIAM RIDENBAUGH'S
ADMINISTRATOR.

1. After the final discharge of a bankrupt is granted, there is a strong, if not conclusive presumption that the final oath required by section 29 of the bankrupt act was duly taken. This presumption is not overcome by the mere fact that such oath is not upon the files.
2. Where the bankrupt died after his uncontested application for a discharge had been submitted to the court and a favorable report of the master had been made, the court has power to order the discharge to be entered *nunc pro tunc* as of the date when the master's report was first filed.
3. Effect of the death of the bankrupt on pending proceedings in bankruptcy, considered.

(Before DILLON, *Circuit Judge*.)

Bankrupt Act.—Discharge.—Death of Bankrupt.

PETITION for review under section 2 of the bankrupt act. William Ridenbaugh was thrown into bankruptcy in 1870.

Young v. Ridenbaugh's Administrator.

The case went through all the stages of bankruptcy proceedings. In April, 1874, the bankrupt regularly applied to be discharged. In September, 1874, his application for a discharge, not being contested, was submitted to the court, and referred to the auditor as master, who, on the 17th day of October, 1874, reported to the court that the bankrupt had complied with the law, taken the final oath, and was entitled to his discharge. The court ordered the discharge. On the 18th day of October, 1874, the bankrupt died. No final oath now appears among the papers. The discharge was not entered of record until the 22d of October, 1874. When the order for discharge was made, whether before or after Ridenbaugh's death, did not exactly appear. Creditors who had proved debts in bankruptcy, sought, by petition in the district court, to set aside the discharge on the ground that no final oath was ever taken by the bankrupt. The court refused to set aside the discharge, and ordered a new certificate to be issued as of October 17, 1874. To review and reverse this order, the creditors bring the present petition for review, making Ridenbaugh's administrator defendant therein. The case was submitted to the circuit judge upon the facts in the opinion of the district judge, a synopsis of which is above given.

Johnson & Botsford, and Lee & Adams, for the creditors.

Henry Flanagan, contra.

DILLON, *Circuit Judge*.—The order of the district court complained of must be affirmed. If it be admitted that in no case, not even in the death of an adjudicated bankrupt, can a discharge be granted unless the oath required by section 29 has been taken and subscribed, still, it does not appear from the record or from any fact found by the district court that the deceased bankrupt did not take and subscribe the final oath. On the 17th day of October the auditor, as master, reported specially that the bankrupt had filed

Young v. Ridenbaugh's Administrator.

the oath required by section 20, and was entitled to a discharge and the court indorsed on this report an order for the bankrupt's discharge, and the discharge was entered of record October 22d, and on that date the certificate thereof was issued. The mere fact that the oath required to be subscribed by the bankrupt is not among the files, does not satisfactorily show that it was not taken and is not sufficient to overcome the contrary presumption arising from the report of the auditor and the order of the court for a discharge. The court below does not find, as a fact, that the oath was not taken. Whether the presumption arising from the order granting a discharge that the final oath was taken is a conclusive one, I need not inquire. Conceding that, in a proceeding of this kind, the presumption is a disputable one, it is not overcome by the record now presented to me.

There is no error appearing of record in the action of the district court ordering a new certificate to be issued as of the day when the auditor's report was filed. The case had gone through all the stages prescribed by the bankrupt act. In May, 1870, a creditor's petition was filed, a warrant issued, and subsequently an adjudication was entered. On April 24, 1874, the bankrupt filed a petition for his discharge, notice was given, and on the 12th day of September, 1874, no objection to the discharge being made by the creditors, his application was submitted to the court, and referred to the auditor, who, on the 17th day of October, reported that the bankrupt had, in all things, conformed to the bankrupt act. Whether the order for the discharge was then made or was made at some time between that day and the 22d of October, does not precisely appear and is not material. On the 18th day of October the bankrupt died. If the order was made before his death the record and the certificate should be changed to conform to the fact. If made after the 18th of October, still, as the application had been fully submitted and was under advisement and the delay was the delay of

Young v. Ridenbaugh's Administrator.

the court and not of the party, the court had the power to order the discharge to be made as of a date when the bankrupt was in life; and this, whether the proceeding be regarded as legal, or equitable, or strictly statutory in its nature. The authorities leave this point in no possible doubt. (Broom's Legal Maxims, 123; *Miles v. Williams*, 9 Ad. & Ellis [N. S.] 47; 2 Daniell's Chan. Prac. 1027; *Campbell v. Meiser*, 4 Johns Ch. 334.)

The result is that the order of the district court must be affirmed.

Other considerations not pressed by counsel, growing out of the nature and purposes of the bankrupt law, lead to the same conclusion and may be briefly mentioned. When a debtor is adjudicated a bankrupt and a conveyance of his property is made to the assignee, it is to be administered by the court under the bankrupt law for the benefit of all his creditors who shall make proof of their debts. Everything relates back to the commencement of the proceeding in bankruptcy, and the bankrupt who surrenders his property and complies with the act is entitled to his discharge. To the creditor, the law gives the benefit of an equal participation in all the assets or property of the debtor, except what is exempted. To the debtor, it gives the benefit of a discharge from his debts if he makes an honest surrender of his property. Debts afterwards created and property afterwards acquired do not come within the bankruptcy; as to these, debtor opens a new book, and commences a new career, subject to his discharge being eventually obtained. Suppose after proceedings in bankruptcy are begun, the debtor dies; what is the effect of his death? Does the proceeding abate or go on? If it abates then the estate must be taken from the bankruptcy court and be administered in the probate or proper state tribunal and creditors must there establish their claims. If, however, the proceeding in bankruptcy continues notwithstanding the death of the debt-

Young v. Ridenbaugh's Administrator.

or, the bankruptcy court must retain the custody of the property and make distribution of its proceeds to those entitled. It is, therefore, material to have settled the effect of the death of the debtor on a pending proceeding in bankruptcy against him. *Troughton & Gilley*, Ambler, 680. By statute 6 Geo. 4, ch. 16, section 26, no commission of bankruptcy abates by the death of the bankrupt after adjudication, but, if he die before adjudication, the commission cannot proceed. *Beale, ex parte*, 2 Vesey & B. 29. *Green, ex parte*, 1 Dea. and Chit. 230; *Dowdney, ex parte*, 15 Vesey, 494. And so by 12 and 13 Vict. ch. 106 sec. 116.

This matter is regulated here by section 12 of our bankrupt act, which provides that "If the debtor dies after the issuing of the warrant (against the estate of the debtor) the proceedings may be *continued and concluded* in like manner as if he lived." That is to say, the death of the debtor after the bankruptcy court has issued its warrant to seize his property shall not have the effect to abate the proceeding. "A bankrupt or insolvent law viewed as operating on the rights of creditors is a system of remedy; it takes out of the hands of the creditors the ordinary remedial processes, and suspends the ordinary rights, which by law belonged to creditors, and substitutes in their place a new and comprehensive remedy designed for the common benefit of all." Mr. Justice CURTIS, in *Betton & Valentine*, 1 Curt. C. C. R. 168, 176. And it is in this sense that an adjudication of bankruptcy has been said to be "a statute execution for all the creditors," and hence does not abate by the death of the bankrupt. (*In re Foster*, 2 Story C. C. R. 181, 142. *Hilliard on Bankruptcy* sec. 16, and cases cited.)

It appears that the creditors of the bankrupt who in the case before me are seeking to have the discharge set aside, proved their debts in bankruptcy. The effect of this is declared by the 21st section of the act, to be that they shall not be "allowed to maintain any suit at law or in equity

Young v. Ridenbaugh's Administrator.

therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt." The 7th section of the act of June 22d, 1874, amending section twenty-one, does not affect the case under consideration, even if it retroacts so as to apply to it. But here, the discharge has not been *refused*, nor within the meaning of the amendment have the proceedings been determined without a discharge.

These creditors state in their petition that their object in seeking to set aside the discharge is that it stands as an impediment to the proof of their demands against the estate of the debtor in the hands of his administrator. They have participated in all of the estate in bankruptcy, and now seek to prove their debts against the estate acquired after the bankruptcy in the hands of the administrator, and to come in on a footing with creditors who became such *after* the filing of the petition in bankruptcy. This, in my judgment, they cannot do, in a case where if the bankrupt had lived he would have been entitled to a discharge from the debts of the petitioners, and they cannot, as I am inclined to think, successfully object to such a discharge on the sole ground that the final oath required by section twenty-nine of the act has not been taken. Notwithstanding the death, the proceedings are to be "continued and concluded" in the same manner as if the debtor had lived, and with the like effect. (Sec. 12.) The death dispenses with the necessity of the final oath, and the discharge, if, indeed, a formal discharge in such a case is necessary, may be entered as of a time when the bankrupt was in life.

AFFIRMED.

NOTE.—As to the power of the court to enter orders and judgment *nunc pro tunc*, notwithstanding the death of a party, see Freeman on Judgments, 34. If one party to an action die, during a *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the court and therefore neither party should suffer. Broom's Legal Maxims, 123; 1 Strange, 426. In *Miles v. Williams*, 9 Adol. and Ellis (N.

 Jordan v. Cass County.

S.) 47, demurrers were set for argument in trinity term, 1844, but were not argued until May, 1845, when judgment was given on them for the plaintiff. The plaintiff having died in March, 1845, the court made absolute an order to enter judgment as of trinity term, 1844, on the ground that the issues of law had been delayed by the act of the court through press of business, until the plaintiffs' death. In *Blouitt v. Tregonning*, 4 Adol. & Ellis, 1002, judgment was entered in May, 1835, upon a verdict for the plaintiff, which was rendered in the spring of 1834. A like entry was made in *Evans v. Rees*, 12 *ib.* 167, in 1840 on a verdict rendered in 1839, the judgment to be of trinity term, 1839; the party in whose favor it was entered having died after verdict, but before judgment. The practice in chancery is the same, 2 Daniell's Ch. Prac. 1037. The American cases recognize and adopt the English practice. In *Campbell v. Meiser*, 4 John. Ch. 334, the case was submitted on the 26th of November, 1819, after which, but before decree, Meiser died. In 1820, the chancellor pronounced his decree, but ordered it to be entered as of November 26th, 1819, the day of submission. In *Woods v. Hayes*, 6 Paige, Ch. 478, the cause was heard and submitted on the 20th of April 1836. In the meantime, and before decree, the *cestui que trust* died. Decree for complainant was rendered on May 2d, 1837, but the chancellor directed it to be entered as of April 20th, 1836. *Hess et al. v. Cole*, 3 Zabriske (N. J.) 116, is to the same effect. In *Perry v. Wilson*, 7 Mass. 393, the case was submitted to the court at the May term, 1810; final decision was rendered at May term, 1811, before that the defendant had died. Upon this fact being suggested to the court, judgment was rendered as of the preceding term in May, the chief justice remarking, "That when action was delayed for the convenience of the court, they would always take care that no party should suffer by such delay." When the plaintiff was non-suited at the trial, and applied for a new trial, and died while the motion was under advisement, the defendant was permitted to enter judgment as of the term succeeding the non-suit, the plaintiff being then in full life. *Spaulding v. Congdon*, 18 Wend. 543; *Bank of U. S. v. Weissiger*, 2 Peters, 481; *Clay v. Smith*, 3 Peters, 411; *Vroom v. Ditmar*, 5 Paige, 528; *Poole v. Loomis*, 5 Arkansas, 110.

 ELIZABETH J. JORDAN v. CASS COUNTY.

1. Bonds negotiable in form, issued by a county in Missouri, on behalf of a township therein, reciting that they "are issued by the order of the county court, made by authority of an act of the general assembly of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' approved March 23, 1868, and authorized by a

Jordan v. Cass County.

vote of more than two-thirds of the voters in said township, to aid in the construction of the Pleasant Hill & Lawrence branch of the Pacific Railroad, of Missouri," said railroad having legal power to build branches and receive such subscriptions, are valid in the hands of a holder for value without actual notice of the facts relied on to defeat a recovery on such bonds.

2. The proceedings of the county court in this case, considered by KREKEL, J., to be binding even if the bonds were in the hands of the original takers thereof.

(Before DILLON and KREKEL, JJ.)

Township Bonds.—Branch Railroad Act.

THE coupons sued on are from bonds issued by Cass county on behalf of Mt. Pleasant township, in that county, to the Pacific Railroad Company, of Missouri, a corporation created by an act of the general assembly (Sess. Acts Mo. 1849, p. 220), and authorized to build branches to any point in any county in which the road might run.

At the time of the issue of the bonds, and when the steps preliminary thereto were taken, a part of its road was constructed in Cass county. The company therefore was authorized to build a branch in that county, and on the 15th day of June, 1869, formally announced its intention to build a branch to the western limits of the county, to be known as the Pleasant Hill & Lawrence Branch of the Pacific Railroad. This was done by filing in the office of the secretary of state, in pursuance of the branch railroad law of March 21, 1868, an offer to Cass county and all others interested to build said branch.

The bonds now in question recite that they "are issued under and pursuant to an order of the Cass county court, made by authority of an act of the general assembly of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri, approved March 23, 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the

Jordan v. Cass County.

Pleasant Hill & Lawrence Branch of the Pacific Railroad, of Missouri."

The county court records show, that the proceedings preliminary to the issue of the bonds were taken strictly in pursuance of the statute (1 Wagner St. 818, sec. 51).

There was a petition of more than twenty-five tax payers and residents of the township presented to the court, praying it to submit to a vote of the qualified voters of the township the question of subscribing \$25,000 to the capital stock of the Pacific Railroad Company, which proposes to build a railroad through said township, to be known as the Pleasant Hill & Lawrence Branch of the Pacific Railroad. Thereupon an order was made in accordance with the prayer of the petition, and the sheriff was directed to give notice of the election, which was fixed for the 13th of July, 1869. The election was duly held, and more than two-thirds of the qualified voters of said township, voting thereat, voted in favor of the subscription. The court thereupon ordered the subscription to be made to the capital stock of the Pacific Railroad and the bonds to be issued.

Before anything further was done, the Pacific Railroad Company appeared by its attorney, and offered the court a contract for building the branch, the only part of which material to be noticed is the following: "It being distinctly understood and mutually agreed by and between the parties hereto, that the stock so to be issued shall be stock in the branch railroad, * * * * and none other, as provided by an act of the general assembly of the state of Missouri, entitled 'An act to aid the building of branch railroads in the state of Missouri,' approved March 21, 1868."

This contract was at first rejected by the court on account of this obnoxious clause. Subsequently petitions were presented signed by more than two-thirds of the qualified voters of the township, in which the petitioners state to the court that "Whereas, there are ambiguities and uncertain-

Jordan v. Cass County.

ties in said original petition as to the meaning thereof, *
* * * we represent that it was the understanding, meaning, object, and design of your petitioners for said bonds to be issued to said Pacific Railroad, and that the certificates of stock to be issued and provided therefor as provided by law be issued on the stock of said branch road, all of which we hold legal and binding on us, and pray the court to act according to the premises aforesaid."

Thereupon the contract offered by the Pacific Railroad Company was accepted, the branch stock received, and the bonds issued and delivered to the Pacific Railroad Company, which forthwith built the branch road. The next step was an order for a levy of a tax of 8-10 of one per cent upon the township to pay the interest to accrue. This order was repeated in each of the years 1870, 1871 and 1872. In the latter year an order was made for the funding of such coupons as then remained unpaid, amounting to some \$1,500; the rest had been paid amounting to about \$3,500, gold.

Finally the revoking order of February, 1878, was made. By this it appears that some of the taxes had been paid, and some remained unpaid. It appears from one of the orders, that the stock held by the company was voted on one occasion by commissioners appointed by the court.

The plaintiff is the holder of the coupons in suit for value, and without notice of any informality or illegality in the issue of the bonds, except so far as notice is imputed by law.

T. K. Skinker, for the plaintiff.

Gage & Ladd, for the defendant.

KREKEL, J.—1. One view of this case is, had the county court of Cass county power to subscribe to, and accept, the stock of the Pleasant Hill & Lawrence Branch road, when the petition under which the order to submit the question of sub-

Jordan v. Cass County.

scription to the voters was made, stated "that they desire as a township, to subscribe twenty-five thousand dollars to the capital stock of the Pacific Railroad Company which proposes to build a railroad through said township, to be known as the Pleasant Hill & Lawrence Branch of the Pacific Railroad?"

The order of submission followed the petition. If the necessary two-thirds vote under this petition and order, favorable to the subscription, was given, I am of opinion that the court was authorized to subscribe to and accept the stock in the branch. The petition itself, in other parts than those quoted, abundantly shows that the proceeding was had under the act of 23d of March, 1868, page 92, Session Acts of 1868—for prior to that time no law authorizing *townships* to subscribe stock to a railroad existed in Missouri.

The petition says that "the Pacific Railroad Company proposes to build a railroad through the township." The proposition here spoken of is verified by the resolution of the board of directors of the Pacific Railroad Company, filed with the secretary of state on the 15th day of June, 1869—after the petition, but prior to the day of election—declaring in favor of building the branch road as authorized and required by the act of the 21st of March, 1868, page 90, Session Acts, 1868. From the proceedings of the tax-payers, the action of the county court of Cass county, as well as the action of the Pacific railroad board, it is very evident that all were acting under the acts cited and attempting to comply with the provisions thereof.

The tax-payers in their petition for submission, employ the very words of the first section of the act of the 23d of March, 1868, "proposing to build." The authority of the first section is, "to subscribe to the capital stock of any railroad company of this state," and this, taken together with the petition and order, that the subscription is to be made for the construction of the Pleasant Hill & Lawrence

Jordan v. Cass County.

Branch of the Pacific Railroad, it may well be, that had the Pacific Railroad Company accepted the subscription to its stock, it would have been bound only to issue stock as of the branch. This view gains strength from a close examination of the second section of the act of the 21st of March, 1868, which provides, that a railroad may receive "subscriptions to stock to aid in its construction in the name of such branch, which shall be expressed in the certificate of stock issued." The third and fourth sections of the act last cited are in harmony with this view, and indeed tend to support it.

The authority to subscribe to and accept the stock of the branch road is then not only justified by the law, but in strict compliance with the design and intention of the tax-payers and the order of the court. In the petition of two-thirds of the tax-payers of the township, they declared this to have been their understanding, and though such a petition cannot be substituted for a two-thirds vote required by law, yet it shows, at least, that the question now raised is a technical one.

2. But supposing the views above expressed should be erroneous, the question arises, in how far are innocent holders of bonds for value affected by the proceedings had in the premises. Here is a bond reciting the law and the facts required to make it a valid commercial obligation payable to bearer — is the purchaser of such bond bound to make inquiry and ascertain whether the issuer of the instrument set out the truth, when the facts at least were peculiarly within its reach, and under the law to be ascertained by the county court, and it alone?

The power being conferred on the county court by law to issue the bonds on a given state of facts, to be ascertained by it, is either an untruthful statement of the facts on the face of the bonds, or even an erroneous exercise of an unquestionable legal power to affect an innocent holder for value?

Washburn v. Cass County.

There has been no actual notice to the plaintiff of any irregularity, if such has occurred. The proceedings in court and the filing of the declaration of intention to build the branch road by the Pacific Railroad Company in the secretary of state's office, impart no constructive notice. The levy and collection of taxes, and the payment of coupons for several years show beyond question how the matter was viewed by all the parties, and though such acts might not estop the defense here interposed, if legal authority was entirely wanting in the county court to issue the bonds, yet they strongly tend to show the wrong that would be done to permit a technicality to stand in the way of substantial justice. In my view the case is with the plaintiff.

DILLON, *Circuit Judge*.—I concur in the result, on the second ground stated in the foregoing opinion of KREKEL, J., without giving any opinion on the view first therein expressed.

JUDGMENT FOR PLAINTIFF.

NOTE.—See *Jordan v. Cass Co. ante*, p. 185.

WILLIAM B. WASHBURN v. CASS COUNTY.

1. Railroad company A was organized for the purpose of eventually consolidating, under a law of the state authorizing it, with company B. A township, under a statute giving the power, voted to issue bonds to pay for stock in company A, and it was accordingly subscribed. Afterwards companies A and B were consolidated and the bonds before voted were issued to the consolidated company and recited a due and legal consolidation. A defense to the bonds was made on the ground that the consolidation was void; held in favor of a *bona fide* holder of bonds for value without notice of the facts which it was insisted rendered the consolidation illegal, that the defense was unavailing; the case being considered to fall within the principle of *Nugent v. The Supervisors*, 19 Wall. 241.
2. It seems that the Missouri railway consolidation act of March 24th, 1870 (1 Wagner's Stats. 814) does not require, as a condition of a legal consolidation, that both of the constituent companies should own roads *completed* in whole or in part—per KREKEL, J.

Washburn v. Cass County.

(Before DILLON and KREKEL, JJ.)

*Railway aid Bonds Issued to Consolidated Railway Company.
Missouri Railway Consolidation Act.*

ACTION on bonds. The material facts are as follows: On the 19th day of July, 1870, a petition, signed by twenty-five tax-payers and residents of the municipal township of Polk, in Cass county, was presented to the county court of that county, setting forth the desire of the petitioners to vote a township subscription of \$15,000 to the capital stock of the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, and requesting the court to order an election to determine if such subscription should be made, upon certain terms named, among others, that the subscription should be payable in bonds. On the same day the petition was granted, and the election ordered to be held on the 30th day of August, 1870.

On the 16th day of the next month (September) due proof having been made to the court that the election had been held and that two-thirds of the qualified voters of the township, voting thereat, had voted in favor of the subscription, *it was accordingly made* upon the terms prescribed.

The Pleasant Hill Division of the Lexington, Chillicothe & Gulf Company, was a corporation created under the general incorporation act of Missouri, and was created, as appears by its articles of association, *for the purpose*, among others, *of consolidating with, and becoming a part of, a certain other company*, similiarly created; and known as the *Lexington, Chillicothe & Gulf Railroad Company*.

One of its proposed termini was to be such point in the south line of Cass county as would enable it most conveniently to intersect and consolidate with the latter company. On the 4th day of October, 1870, this consolidation was duly effected, both companies having previously signified their acceptance of the general law relating to consolidation of railroads in the manner required thereby.

The new or consolidated company took the name of the Lexington, *Lake & Gulf* Railroad Company, and by the terms agreed upon, became possessed of and *entitled to all the powers, rights, franchises, privileges, assets, subscriptions, bonds, moneys and properties whatever of each of the constituent companies.* On the 2d of May, 1871, the county court, by an order reciting all the steps previously taken by the court, the vote of the people, the object of the incorporation of the Pleasant Hill Division, and the fact of the consolidation, and also that the terms of the subscription had been faithfully complied with, directed that the bonds authorized by the vote of August 30th, be delivered to the Lexington, *Lake & Gulf* Company, at the same time acknowledging the receipt of certificates of full paid stock in *that* company to the proper amount.

These bonds were accordingly issued, and contain the following recitals :

“ This bond being issued under and pursuant to an order of the county court of Cass county, by virtue of an act of the general assembly of the state of Missouri, approved March 23d, 1868, entitled ‘ An act to facilitate the construction of railroads in the state of Missouri,’ and authorized by a vote of the people, taken August 30th, 1870, as required by law, upon the proposition to subscribe \$15,000 to the capital stock of the Pleasant Hill Division of the Lexington, *Chillicothe & Gulf* Railroad Company, and which said railroad company last aforesaid, and the former Lexington, *Chillicothe & Gulf* Railroad Company, were on the 4th day of October, 1870, consolidated as required by law into one company, under the name of the Lexington, *Lake & Gulf* Railroad Company, and which said last named railroad company, as provided by law, and under said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, *subscriptions, bonds, moneys and properties whatever of the two said several companies forming said consolidation, or either of them.*”

Washburn v. Cass County.

On the 4th day of October, 1870 (the date of consolidation) *no work had been done* by the Pleasant Hill Division on the line. Afterwards the Lexington, Lake & Gulf Company graded and bridged a portion of it, but no part was ever completed.

The relative positions of the consolidated and the two constituent roads were shown by a map, which constituted part of the agreed case. The coupons sued on are from the bonds issued as above shown; and the plaintiff is a holder of them *for value*, and *without notice* of any irregularity or illegality attending their issue, if any in fact exists, except such as results from operation of law from the facts hereinbefore stated.

The act of legislature of March 24th, 1870 (1 Wagner's Stats. 314) in respect to the *consolidation of railways*, is as follows:

"Any two or more railroad companies in this state existing under either general or special laws, and owning railroads *constructed wholly or in part*, which when completed and connected, will form in the whole or in the main, one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company, owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation the companies interested may enter into contract, fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders, regularly called for the purpose; or by the approval in writing of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement,

Washburn v. Cass County.

with the corporate name to be assumed by the new company, shall be filed with the secretary of the state, when the consolidation shall be considered duly consummated; and a certified copy from the office of secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock outstanding, in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole, or in the main, in the same general direction, and provided, it shall not be lawful for said road to consolidate in the whole, or in part, when by so doing it will deprive the public of the benefit of competition between said roads; and in case any such railroads shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which said road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise; and in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars, without breaking bulk, upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad company shall consolidate their roads under the provisions of this act, they shall each file with the secretary of state a resolution ac-

Washburn v. Cass County.

cepting the provisions thereof, to be signed by their respective presidents, and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders thereof to be called for the purpose of considering the same."

T. K. Skinker, and Davis & Smith, for the plaintiff.

W. P. Hall, and Gage & Ladd, for the defendant.

KREKEL, J.—The main question is, could the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company consolidate with the Lexington, Chillicothe & Gulf Railroad Company without having a part of its road constructed, or having work done thereon.

The agreed statement of facts admits that on the 4th day of October, 1870, the date of filing the articles of consolidation between the two roads, and assuming the name of the Lexington, Lake & Gulf Railroad, "The Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company had constructed no part of its said railroad, in whole or in part, and had done no work thereon. In order to arrive at the intention and meaning of the consolidation act, it is necessary to look into the various provisions of law conferring authority upon the companies concerned.

The Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company was duly organized. The act of March 23d, 1868, provides for a submission on the petition of twenty-five tax-payers of any municipal township, setting forth their desire to subscribe to the capital stock of any railroad company in this state, building or proposing to build a railroad.

When the twenty-five tax-payers presented their petition to the county court of Cass county, there was but one company organized to build a road "passing through or near

Washburn v. Cass County.

said township of Polk" (quoting from the petition), and that company's articles of association in its second section provided that it was intended "eventually to consolidate with and form a link and be a part of the main line of the said Lexington, Chillicothe & Gulf Railroad." Without this connection it would have been a railroad beginning and ending in the open country.

The subscription (voted by the necessary two-thirds vote) was, on the 16th day of September, 1870, made by the county court to the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad; but it is said the bonds and coupons issued under it to the Lexington, Lake & Gulf Company (which is the corporate name of the consolidated company) are void, because the consolidation was illegal and null.

It is contended that to make a legal consolidation under the statute authorizing it, the company must own railroads *constructed* wholly or in part. (Act of March 24th, 1870, 1 Wagner's Stats. 814.)

The language of the first section of the act is: "Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole, or in the main, one continuous line of railroad, are hereby authorized to consolidate, in the whole or in the main, and form one company owning and controlling such continuous line." In the same section all consolidations, contrary to the act, are declared void, "and any person or party aggrieved, whether stockholder or not, may bring an action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise."

The question is, what is meant by the language, "owning

Washburn v. Cass County.

railroads constructed wholly or in part" — must both roads be wholly or in part constructed ?

Looking to the object had in view in authorizing consolidation of roads wholly or in part constructed, the inference is, that the building and construction of roads were thereby to be advanced, and such construction should be given to the act as to accomplish this so far as the language used will reasonably permit.

A railroad company duly organized, and having private and corporate stock subscribed to it, may, under the language quoted, said to be owning a railroad, and indeed would seem to own it, unless the words are construed to mean work done on the road, in grading, bridging, etc. But it is not necessary to give the construction here indicated, for as one of the consolidated roads, namely, the Lexington, Chilli-cothe & Gulf Road, was under actual construction at the time of consolidation, the law is fully complied with, unless *both* companies must own roads constructed wholly or in part.

The views as to the proper construction of the consolidation act here indicated, gain strength from the provisions of the act of March 23d, 1868, which authorizes subscriptions to capital stock to companies "building or proposing to build a railroad." Under this act, the vote and subscription were authorized, and that to a company whose declared purpose was to eventually make the very consolidation under consideration. Unless the consolidation was void, there can be no question but that the new company succeeded to all the rights of each of the companies consolidated, and that the issuing of the bonds to such consolidated company to pay a subscription to one of them — the Pleasant Hill Division — was lawful.

The question whether each of the consolidated companies "owned railroads constructed wholly or in part," so far as this is a question of fact, was a fact peculiarly within the

Washburn v. Cass County.

knowledge of the county court; and to the existence of which it certified by the recital in the bond, that the consolidation was in due form of the law. Even if such recital did not estop the defendant from denying it, an innocent purchaser of the bonds, for value, is not affected by its falsity, if false it was.

The question, whether the legal existence of a corporation, in the exercise of corporate functions as this consolidated company was, when building a part of the Pleasant Hill Division, after consolidation, as admitted in the agreed statement of facts, can be taken advantage of collaterally, is one which seems, on authority, to be against the defendant. It must have been so viewed by the legislature, for they provided a remedy without invoking the aid or awaiting the action of the state by declaring all consolidation contrary to the act void, and that "any person or party aggrieved, either stockholder or not, may bring an action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise."

There is some force in the position taken by the plaintiff, that if the consolidation was void in this case, the original subscription to the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad being unquestionably valid, these bonds may be held good under that subscription and in payment thereof.

Be this however, as it may, the plaintiff has declared on the bonds of the consolidated company and by that it must stand. With no decisions of the supreme court expounding the above mentioned consolidation act, such a construction has been given to it as in my view best harmonizes with the law, and the design of the legislature in enacting it.

The objections as to conditions of consolidation in other respects can have no application here, for it is obvious that

Washburn v. Cass County.

a road, such as the Pleasant Hill Division, with no means to connect, would without consolidation be utterly useless and worthless. So well was this understood that "eventual consolidation" was provided for in the articles of association.

The case is with the plaintiff.

DILLON, *Circuit Judge*.—I concur in the result of the foregoing opinion and in the main in the views therein advanced.

The leading elements in the case are, that the bonds are negotiable, were issued by the proper officers, and the plaintiff is a *bona fide* holder for value without any notice of the facts now ruled on as a defense, except for far as he is bound in law to take notice thereof.

The vote was duly had in favor of the Pleasant Hill Division, a distinct corporation, and whose articles in express terms provided for a consolidation with the very company with which it afterwards consolidated.

The subscription was made to the stock of the company voted for; but *afterwards* and before the bonds in suit were issued, the contemplated consolidation was effected by the concurrent action of the stockholders of the two constituent companies, and a new company formed. All the steps required by law to effect this consolidation were taken, and the bonds were issued, as by the statute they were required to be, to the new company. (See also, *Nugent v. The Supervisors*, 19 Wall. 241.)

But it is said that this consolidation is void, and hence the bonds were illegally issued. It is to be remarked, however, that the validity of the organization of the new company has never been questioned by any stockholder, nor by the state. I do not consider it to be necessary in this case to determine whether on the facts agreed a stockholder or the state could successfully question the validity of the con-

Weed Sewing Machine Co. v. Wicks.

olidation on the ground that one of the companies, although possessing capital stock paid in and subscribed, had in point of fact no part of its road actually constructed.

It is not claimed that the plaintiff had actual notice of this fact when he purchased the bonds; and the bonds in express terms recite that the consolidation was made as required by law. Upon this recital as respects facts *in pais*, the purchaser of the bonds had a right to rely; and in the face of this recital, the plaintiff was not bound to inquire whether each of the two constituent companies had all or some part of its road actually completed, nor whether the roads when completed would form a continuous line, even if each of these facts was an essential condition of a consolidation *de jure*.

This case is substantially within the doctrine of *Nugent v. The Supervisors*, above cited, and differs from *Harshman v. Bates County*, reported *ante*, p. 150, where the subscription was made *after* the consolidation, and where there was no authority in the charter of the company voted for to consolidate with another company.

JUDGMENT FOR PLAINTIFF.

NOTE.—Other cases against Cass county, *ante*, pp. 147, 185.

WEED SEWING MACHINE CO. v. S. TAYLOR WICKS, *et al.*

1. Since the act of congress of June 1, 1872 (17 Statutes at Large, 197, sec. 5), the provisions of the state statutes as to pleading and practice in purely legal actions are in the main applicable to such actions in the circuit court of the United States.
2. Where the state law directs or authorizes all suits to be brought in the name of the *real party in interest*, this will, in the absence of some special statute of congress, give the like party the right to sue in actions at law in the federal courts sitting in such state.

Weed Sewing Machine Co. v. Wicks.

(Before DILLON and KREKEL, JJ.)

Practice.—Parties.—Act of June 1, 1872.—Real Party in Interest.

ON demurrer to the petition. The plaintiff is the Weed Sewing Machine Company, which the petition alleges to be created by the laws of the state of Connecticut and a citizen thereof. The petition states that the defendants are citizens of Missouri and residents in the western district thereof.

The petition counts upon a bond executed by the defendants, as follows:

“Know all men by these presents, that we, E. Taylor Wicks, John S. Tyler, and John W. Lisenly, of Springfield, county of Greene, and state of Missouri, are held and firmly bound to *F. S. Bartram*, of the city of St. Louis, and *state of Missouri, agent for the Weed Sewing Machine Company*, of Hartford, Conn., in the penal sum of one thousand five hundred dollars, to be paid the said *F. S. Bartram*, agent, or *his* attorney, executor, administrator or assignee. For which said payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and every one of them, by these presents. Sealed with our seals, and dated this 1st day of July, A. D. 1871. The condition of the above obligation is such, that whereas, S. Taylor Wicks, and John S. Tyler, of Springfield, Mo., as aforesaid, intend to carry on the trade or business of dealing in the sewing machines manufactured by the Weed Sewing Machine Company, of Hartford, Conn., at said Springfield, for which said sewing machines the said *F. S. Bartram* is general agent, and whereas, the said Wicks and Tyler have applied to the said *F. S. Bartram*, agent, to supply them with goods in the way of their trade, which he, as agent of said company, has agreed to do upon condition that the said Wicks and Tyler enter into a bond in the penalty above mentioned, upon the terms hereinafter expressed. Now if the said Wicks and

Weed Sewing Machine Co. v. Wicks.

Tyler, their heirs, executors or administrators, shall, from time to time, and at all times hereafter, *pay or cause to be paid unto the said F. S. Bartram, agent of said company, his executors, administrators or assigns, all and every such sum or sums of money as shall at any time or times hereafter become due and owing to the said F. S. Bartram, agent as aforesaid,* for goods sold or furnished by him to the said Wicks and Tyler, or sent or delivered on their order, at the time said sum or sums respectively become due and payable; or if the said Wicks and Tyler, their executors or administrators, shall at any time or times hereafter make default in the payment of such sum or sums when due and payable, but shall well and truly pay the same within thirty days from the day a written notice of said default and failure to make payment, as aforesaid shall be deposited in the post office at St. Louis, by said F. S. Bartram, agent, addressed to the said Wicks, Tyler, or Lisenly, at Springfield, Mo., aforesaid, or within thirty days from the time personal notice of said default and failure to make payment is given said Wicks, Tyler, or Lisenly by said F. S. Bartram, agent, then, in any of said cases, the above written bond and obligation shall be void and of no effect; otherwise shall remain in full force and virtue.

“In testimony whereof, we have hereto affixed our hands and seals this first day of July, A. D. 1871. (Signed.)

“S. T. Wicks, John S. Tyler, and John W. Lisenly.”

The petition alleges that the plaintiffs, at the request of the defendant, supplied the latter, under the said contract or bond, with machines at the prices stated in an account thereof annexed to the petition, and that the defendants, though requested, have failed to pay the amount due the plaintiffs therefor.

It is also alleged that the plaintiffs are the sole and real parties in interest in the bond declared on, and that the plaintiffs' agent, the said Bartram, never had any interest therein.

Weed Sewing Machine Co. v. Wicks.

The code of Missouri contains this provision : " Every action shall be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust * * may sue in his name without joining with him the person for whose benefit the suit is prosecuted ; and a trustee of an express trust includes a person with whom, or in whose name, a contract is made for the benefit of an other." (Wagner's Statutes, p. 999, secs. 2 and 8.)

The demurrer to the petition rests upon the following grounds :

1st. The action upon this bond can only be brought in the name of F. S. Bartram, the obligee therein named.

2d. If it can be brought in the name of the plaintiff (the Weed Sewing Machine Company) the petition, in order to give this court jurisdiction, should show that Bartram was a citizen of some other state than Missouri and so could himself have maintained an action thereon.

Erving & Smith, and Bray & Kenton, for the plaintiff.

Edwards & Son, for the defendants.

DILLON, *Circuit Judge*. — I am inclined to the view that Bartram and not the corporate plaintiff, his principal, is the obligee in the bond, and for the purposes of this demurrer will concede such to be the case. The result of this concession is that by the principles of the common law, an action for the breach of the condition of the bond, which is under seal, could be brought only in the name of Bartram, although his principal might alone be interested in the recovery.

It must also be conceded that under the federal constitution and legislation, the distinction between law and equity, and the corresponding remedies, is established, and remains in full force unaffected by the practice act of June 1, 1872.

Weed Sewing Machine Co. v. Wicks.

(*Robinson v. Campbell*, 3 Wheat. 212; *Bennett v. Butterworth*, 11 How. 674; *Thompson v. Railroad Companies*, 6 Wall. 134.) Indeed that enactment not only recognizes, but proceeds upon this distinction.

It is also undoubtedly true, that under the provisions of the Missouri code in respect to parties quoted in the statement of the case, an action like the present *might* be brought in the proper court by Bartram *in his own name* although his principal would alone be interested in the recovery. But it is equally true (under the averment made in the petition to the effect that the sewing machine company is the sole and real party in interest and supplied the consideration for the debt sought to be enforced) that under the provision of the Missouri code, the action, if brought in the state court, might be maintained by the sewing machine company in its own name. (Wagner's Stats. p. 999, secs. 2, 3, and notes of cases.)

The present action being one at law, the mode of pleading and procedure prescribed by the state statute is applicable to it, and the suit is well brought, under the averments of the petition, in the name of the plaintiff as the real party in interest. This principle was distinctly decided by the supreme court prior to the act of 1872, in respect to cases removed from the state to the federal court. (*Thompson v. Railroad Companies*, 6 Wall. 134.) In the case cited, Mr. Justice DAVIS remarks: "The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue, when the suit is brought in the state court in conformity with it." Since the act of 1872, at all events in a purely legal action, the real party in interest has a right to sue in federal courts, if the case is one which is otherwise within the jurisdiction of those courts, and there is no special statute of congress, making a different provision.

If this view is correct, then this suit is well brought in

Weed Sewing Machine Co. v. Wicks.

the name of the plaintiffs, and this is decisive of the question made by the defendants, for it is well settled that it is the citizenship of the parties to the record that governs in determining the jurisdiction of the circuit court, not of persons interested in the controversy, but who are not parties. (*Irvine v. Lowry*, 14 Pet. 298; *Bonafee v. Williams*, 3 How. 574; *Osborn v. Bank of United States*, 9 Wheat. 856; *Davis v. Gray*, 16 Wall. 208, 220; *Coal Co. v. Blatchford*, 11 Wall. 172).

As the petition shows that the plaintiffs alone furnished the consideration for the debt or claim sought to be enforced, and that the agent, Bartram, had no interest therein, if the promise of the defendants, though made in form to Bartram, had not been contained in an instrument under seal, there is a line of strong adjudications which hold that plaintiffs might sue to enforce the promise without the aid of any statute. It is, however, unnecessary to consider the case in this view, as the state statute gives the plaintiffs the right, and the act of congress of June 1, 1872, makes the right equally available to them in the federal court.

They are not the assignees of Bartram, and hence it is not necessary that the petition should show that Bartram's citizenship is such that he could have maintained the action if no assignment had been made.

JUDGMENT ACCORDINGLY.

NOTE.—As to real parties in interest, see *Edna Ins. Co. v. H. & St. Joseph R. R. Co. ante*, p. 1. See, also, *Opdyke v. Pacific Railroad, ante*, p. 55.

Williams v. Missouri, Kansas & Texas Railway Co.

SAMUEL K. WILLIAMS v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

1. For the purposes of federal jurisdiction a corporation is conclusively considered as if it were a citizen of the state which created it.
2. This principle applied, and the defendant company held to be a citizen of the state of Kansas, under whose laws it was organized, and not of Missouri under whose laws it had gone into that state and purchased and was operating therein a line of railway in connection with its line in Kansas.
3. The case in judgment considered to be analogous to that of the *Baltimore & Ohio R. R. Co. v. Harris*, 12 Wall. 65, and distinguishable from the *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 236.

(Before DILLON and KREKEL, JJ.)

Jurisdiction over Railway Companies of other States.—Effect of the Granting of Charters by Different States on Federal Jurisdiction.

THIS was an action brought originally in one of the courts of the state, to recover damages for the alleged wrongful ejection of the plaintiff and his family from the cars of the defendant while traveling as passengers upon that part of its road lying in the state of Missouri. The defendant company applied in due form under the act of March 2nd, 1867, for the removal of the cause to the circuit court of the United States for the western district of Missouri, stating on oath that the plaintiff was, and is, a citizen of Missouri; that the defendant was and is a citizen of Kansas; that the amount in controversy exceeds \$500, and that by reason of prejudice and local influence, the defendant can not obtain justice in the state court wherein the suit is pending. Bond with sureties was given and accepted, and the state court ordered the removal of the suit to this court.

The plaintiff now, to-wit, at the November term, 1874, moves to remand the cause to the state court on the ground

Williams v. Missouri, Kansas & Texas Railway Co.

that the defendant company is a domestic corporation, that is, a Missouri corporation, and hence is a citizen of the same state with the plaintiff. It is upon this motion that the cause is now before the court.

It was admitted that the defendant company was incorporated under the incorporation laws of the state of Kansas, and that it owns and operates a portion of its line in that state, as well as in the state of Missouri. And it is admitted that the cause was properly removed to this court on the ground that the plaintiff is a citizen of Missouri, and the company, for jurisdictional purposes, a citizen of Kansas, unless the company is also to be regarded in respect to this suit as a corporation of the state of Missouri and a citizen of the last named state.

The claim of the plaintiff that it is to be thus regarded, rests upon certain provisions of the statute of the state of Missouri, and the action of the defendant had under its authority.

The statute relied on by the plaintiff is as follows:

"Any railroad company heretofore incorporated, or hereafter organized, in pursuance of law, may at any time by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad, within or without the state, for the purpose of forming a connection of the last mentioned road, with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundry line of the state, may extend into the adjoining state, and for that purpose may build, buy, or lease a railroad in such adjoining state, and operate the same, and may own such real estate and other property, in such adjoining state, as may be convenient in operating such road; or any railroad company, organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad with all its privileges,

Williams v. Missouri, Kansas & Texas Railway Co.

rights, franchises, real estate, and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, *upon such terms as may be agreed upon between said companies respectively, or any railroad company* duly incorporated and existing under *the laws of an adjoining state, or of the United States, may extend, construct, maintain and operate its railroad into and through this state*, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations, organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state, concerning railroad corporations, as fully as if incorporated in this state, *provided that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected until a meeting of the stockholders* of the said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or shall assent thereto, in writing, and a certificate thereof signed by the president and secretary of the said company, or companies, shall have been filed in the office of the secretary of state; and provided further, that if a railroad company of another state shall lease a railroad the whole or a part of which is in this state, or make arrangement for operating the same as provided in this act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads

Williams v. Missouri, Kansas & Texas Railway Co.

in this state; and a corporation in this state, leasing its road to a corporation of another state, shall remain liable, as if it operated the road itself, and a corporation of another state being the lessee of a railroad in this state shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued in all cases, and for the same causes and in the same manner as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other, and a corporation of another state being the lessee as aforesaid or extending its road as aforesaid into or through this state, shall establish and maintain an office on the line of the road so leased or constructed, at which legal process and notice may be served as upon railroad corporations of this state." (Act of March 24th, 1870; 1 Wagner's Stats. 3d ed. 815.)

Previous to the enactment of the foregoing statute, the legislature of the state of Missouri had chartered the Tebo & Neosho Company with authority to build a railroad, therein provided.

Under the authority of the first mentioned statute, a majority of the stockholders of the Tebo & Neosho Railroad Company, of Missouri, at a meeting duly convened, on the 11th day of October, 1870, adopted and entered of record a resolution, "to sell, assign and convey to the Missouri, Kansas & Texas Railway Company, a corporation organized under the laws of Kansas, *all of its privileges, rights, powers, franchises*, real estate and other property, the whole or any part of which is in this state (Missouri) *excepting only* such as belong to the extension of the Tebo & Neosho line *north* from Sedalia." The resolution sets forth the terms of this sale to the Missouri, Kansas & Texas Company of the line of the Tebo & Neosho Company *south* of Sedalia, Missouri, and provides that the Missouri, Kansas & Texas Company "shall assume all indebtedness incurred by the construction or other-

Williams v. Missouri, Kansas & Texas Railway Co.

wise of the line between Sedalia and Fort Scott, the line purchased, and shall have, exercise, and enjoy all the rights, powers, privileges and immunities of the original charter of the Tebo & Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as had been heretofore exercised and enjoyed by this company or its several stockholders."

A conveyance pursuant to these resolutions was made soon afterwards by the Tebo & Neosho Railroad Company to the Missouri, Kansas & Texas Company, of all of that part of the line of the former company *south* of Sedalia, containing, *inter alia*, a provision that the last named company should increase its stock 36,475 shares, being an amount equal to the capital stock of the Tebo & Neosho Company, which had been subscribed and paid for by individuals and towns and counties along the portion of the road thus sold and merged, and should issue and deliver to the holder of every share of stock of the Tebo & Neosho Company a like share of its own stock, subject to all calls and liabilities, if any, attaching to the stock so exchanged. A certificate of the aforesaid action, and the conveyance of the Tebo & Neosho Railroad Company to the defendant, was duly filed with the secretary of the state of Missouri, January 4th, 1871, and properly recorded. The defendant company afterwards constructed or finished the construction of the road on the portion of the line thus purchased, and has since operated the said road in Missouri, Kansas & Texas as a continuous line.

The injury for which this action is brought is alleged to have occurred in the state of Missouri, on part of the line of the road purchased and acquired by the defendant in the manner aforesaid. And the question is, whether the defendant company is, for jurisdictional purposes, as respects this action, to be considered in this court as a citizen of the state of Kansas. If so, this court, it was conceded, has juris-

Williams v. Missouri, Kansas & Texas Railway Co.

diction of this suit. If not, it is admitted, that the cause should be remanded to the state court.

Johnson & Boon, and *J. LaDue*, for the plaintiff.

Phillips & Vest, for the defendant.

DILLON, *Circuit Judge*.—The question here presented is important, since it involves the right of the defendant, which runs and operates a long line of railroad within the state of Missouri, to have access to the federal courts therein.

We have given to the statute of Missouri, which controls its decision, and to the judgments of the supreme court of the United States, having a bearing upon it, careful consideration, and our opinion is that the cause was properly removed into this court.

Upon the statute and facts brought to our attention it is plain that the defendant is a Kansas, and not a Missouri corporation. If so, then it is "for the purposes of federal jurisdiction to be regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted." (*Railroad Co. v. Harris*, 12 Wall. 65, 81; *Railway Co. v. Whitton*, 13 Wall. 270, 285; *Louisville, &c. R. R. Co. v. Leston*, 2 How. 497.) It is an admitted fact that the defendant company was originally organized under the incorporation laws of the state of Kansas, and hence is a Kansas corporation, and for jurisdictional purposes in the federal courts is considered to be a citizen of that state; but it is claimed by the plaintiff that the defendant, by virtue of its purchase of *part* of the line of the Tebo & Neosho Railroad Company, under the Missouri act of 1870, became, as to the line thus purchased, a corporation of the state of Missouri, and hence cannot litigate in the federal court therein with a citizen of the same state.

After an attentive examination of the statute of Missouri

Williams v. Missouri, Kansas & Texas Railway Co.

in question, under which the defendant purchased part of the line of the Tebo & Neosho Company, and constructed the road it operates in the state of Missouri, it is our opinion that the defendant did not thereby cease to be, even in the state of Missouri, a Kansas corporation, nor did it become, as to the road within the state of Missouri, a new and distinct corporation created by the laws thereof. There is no language in the Missouri act which re-incorporates it or which purports to *create* a new corporation; but the whole scope of that part of it conferring upon corporations of another state the power to purchase and operate roads in Missouri, is, that such corporations retain their identity, and remain foreign corporations, but subject to taxation, and to all the duties, liabilities and provisions of the laws of Missouri, the same as corporations created under such laws. Among other things, they are to establish an office on the line of roads acquired, under the act, "at which legal process and notice may be served *as upon railroad corporations of this state.*"

The case is strikingly analogous to that of the [Baltimore & Ohio] *Railroad Company v. Harris*, 12 Wallace, 65, in which it was held that similar legislation on the part of the state of Virginia, and of congress in respect to the District of Columbia, did not create a new corporation of the Baltimore & Ohio Railroad Company, originally chartered by the state of Maryland, and which constructed extensions of the road through Virginia, and within the district of Columbia. The case before us is unlike that of the *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 286, in which a railroad company chartered by the laws of Indiana and licensed by Ohio, sued a citizen of Indiana in the federal court of the latter state, and where the judgment of the supreme court was against the jurisdiction.

The object of the legislation of Missouri under consideration is obvious. Without the sanction of the legislature a

Williams v. Missouri, Kansas & Texas Railway Co.

domestic corporation of that state would have no power to sell out to another company all or part of its road and franchises, and a foreign company without such sanction would have no authority to purchase and operate the road of a domestic corporation. The various provisions of the act show that the legislature designed to encourage the building of railroads and to facilitate the making of continuous or connected lines, by authorizing, as far as it could, its own companies to extend their roads into other states, and by conferring upon the companies of other states the right to lease or to buy, and to build and operate roads within its limits. But as above observed, it did not create such companies new corporations, but simply gave them on the conditions stated, the rights, powers and immunities specified in the act. It is, therefore, unnecessary to consider in this case what would have been the effect on the jurisdiction of this court, if the legislature of Missouri had undertaken to make new or domestic corporations of the companies of other states coming into it, under the act of 1870. Nor have we any occasion to determine how far such a case would be controlled by that of *Wheeler* (1 Black, 287), nor how far the doctrines of that case have been modified by the subsequent decisions of the same tribunal.

The motion to remand is accordingly overruled.

MOTION DENIED.

NOTE.—As to the effect on federal jurisdiction (where it is dependent upon the citizenship of the parties) of charters granted by different states to the same company or to companies constructing the same line of road, and as to the effect of consolidation on the jurisdiction of the federal courts, the following are the principal cases: *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286; *Balt. & Ohio R. R. Co. v. Harris*, 12 Wall. 65; *Oh. & N. W. R. R. Co. v. Whitton*, 13 Wall. 270. See, also, *Marshal v. B. & O. R. R. Co.* 16 How. 314; *Balt. & O. R. R. Co. v. Gallahue's Administrator*, 13 Grattan, 658; *Same v. Supervisors*, 1 West Va. 19; *Goshorn v. Supervisors*, 1 West Va. 308. See *Northwestern Railway Company v. Chicago*

United States v. Maxwell.

go & Pacific Railway Company, 7 Chicago Legal News, Nov. 14, 1874, 57, decided by Circuit Judge DRUMMOND, as to the effect of consolidation under charters of different states and the citizenship of the consolidated company.

UNITED STATES v. WILLIAM R. MAXWELL.

Offenses "not capital or otherwise infamous" may, by leave of court, upon complaint on oath, be prosecuted in the federal courts by criminal information.

(Before DILLON and KREKEL, JJ.)

Mode of Criminal Prosecution in Federal Courts.

AN information charging the defendant with several violations of the internal revenue laws was filed by the district attorney by leave of court. Prior to the term, complaint on oath had been made before a United States commissioner, charging the defendant with said offenses against the revenue laws, and the defendant was arrested upon a warrant issued by the commissioner, and held to answer to the United States District Court, and required to give bail in the sum of \$500, which he did. At the term, the district attorney, upon the said complaint, warrant and recognizance moved the court for leave to file criminal information against the defendant charging him with the said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment upon the ground that the defendant can only be prosecuted and punished criminally upon the presentment or indictment of a grand jury, and not upon an information.

It is upon this motion that the case is before the court.

United States v. Maxwell.

James S. Botsford, district attorney, for the United States.

Mack J. Leaming, for the defendant.

DILLON, *Circuit Judge*.—The offense charged in the information is a misdemeanor, and not a “capital or otherwise infamous crime.” The defendant was originally arrested by virtue of a warrant issued by a commissioner of the United States upon a complaint duly made to him under oath, showing probable cause. There is, therefore, no ground to claim that the guarantees of personal liberty secured by the fourth amendment to the constitution have been violated, which provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.”

The information was afterwards filed by leave of court, and the defendant after pleading guilty, moved in arrest of judgment. This motion must be sustained if there is no authority of law for the prosecution of such misdemeanors in the federal courts by criminal information.

The fifth amendment to the federal constitution provides that “no person shall be held to answer for a *capital or otherwise infamous crime* unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or other public danger.” The offense charged against the defendant is not a “capital or infamous crime.” The words “infamous crime,” have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness. The fact that an offense may be, or must be, punished by imprisonment in the penitentiary does not necessarily make it, in law, infamous. 1 Bish. Cr. Law, secs. 70, 644; *Rex v. Hickman*, 1 Moody, 34; *Common-*

United States v. Maxwell.

wealth v. Shaver, 3 Watts and Serg. 388; Russell on Crimes, 126; 1 Greenl. Ev. secs. 372, 378; *People v. Whipple*, 8 Cowen, 707; *United States v. Shepard*, 1 Abb. U. S. Rep. 431, 439.

The constitutional provisions, therefore, as to the mode of prosecuting capital and other infamous offenses, has no application to the misdemeanor set forth in the information.

But the question remains, whether other than capital and infamous offenses may be prosecuted in any other mode than upon punishment or indictment of a grand jury. In other words, must all federal offenses of whatever character or grade be prosecuted upon an accusation made by a grand jury?

The constitutional provision above quoted does not say that all offenses must be prosecuted with the sanction of a grand jury, but only that certain classes of offenses must be. The fair implication is that offenses other than those falling within the classes specially described may be prosecuted otherwise than by the intervention of a grand jury. And certainly as respects offenses not capital and not infamous, there is no restriction upon congress as to the mode of procedure; and as to such offenses it is entirely competent for congress to provide that they shall be prosecuted upon indictment or information, or in either mode. But there is no act of congress prescribing in terms that such offenses shall be proceeded against upon indictment or by information, or otherwise. Of course they may be prosecuted by indictment. This is admitted; and it is clear from the fifth constitutional amendment and from various provisions of acts of congress in relation to grand juries, etc., that it is contemplated that crimes of all grades may be prosecuted upon the presentment or indictment of a grand jury. But is it contemplated that all offenses although not infamous must be thus prosecuted? There is no act of congress to that effect; and no specific declaration of its will for or against prosecutions by criminal information.

United States v. Maxwell.

Criminal prosecution for misdemeanors was a familiar mode of procedure in England, "as ancient," says Blackstone (4 Com. 309), "as the common law itself;" and was the only existing mode of prosecution, it seems, except by indictment or presentment of a grand jury. (*Ib.* 308.) It was a mode in daily and constant use in England at the time of the American Revolution, as well as in the American colonies. This was well known when the fifth amendment of the constitution was adopted, which provided only for the previous action of a grand jury in capital or otherwise infamous offenses. If it had been intended wholly to prohibit prosecution by information, language expressive of such intention would have been used. Congress has never enacted a code of criminal procedure, and the states have no power to prescribe either modes of proceeding, or rules of evidence in prosecutions for federal offenses. In a general way the federal courts must be governed in these respects by the common law with the modifications pointed out by the supreme court. (*United States v. Reid*, 12 How. 361.)

Congress, nevertheless, created federal offenses, and clothed the federal courts with jurisdiction over such offenses, and no legal reason exists, in the absence of express legislation, why such must be prosecuted in only one of the two well known common law methods.

Owing to causes, not necessary here to notice (4 Blacks. Com. 309, 310), the proceeding by information was unpopular in England, and doubtless also in the colonies, and it has in many of the states from a very early day, been either restricted or prohibited. In the law lectures of JUDGE WILSON, one of the justices of the supreme court of the United States, which were delivered in 1790, he recognizes an information in the name of the state as one mode of prosecuting crimes and offenses, and after referring to the two kinds (one strictly public, and the other at the instance of a private person or informer) says: "Restraints

United States v. Maxwell.

have, in England, been imposed upon the last species; but the first—those at the King's own suit, filed by his attorney-general—are still unrestrained (4 Bl. Com. 307). By the constitution of Pennsylvania, both kinds are effectually restricted. By that constitution, however, informations are still suffered to live, but they are bound and gagged. They are confined to official misdemeanors; and even against those they can not be filed but by leave of the court. By that constitution no person shall, for any indictable offense, be proceeded against, criminally, or by information, unless by leave of the court, for oppression and misdemeanor in office." (3 Wilson's Works, 144, 145.) See, also, 4 Wend. Bl. Com. 309, note, as to bill of rights and decisions in New York; Wharton's Crim. Law (7th ed.), sec. 213.

Thus, by constitutional provision and positive legislation in the states, informations, as a mode of criminal prosecutions, were either very much restricted or abolished, and the result was, that in the state courts, the prevailing method of prosecution was by indictment, and naturally the same practice obtained in the federal courts.

But the constitutional provision (fifth amendment) leaves all offenses open to prosecution by information, except those which are capital or infamous, and there is no enactment of congress preventing a resort to this mode of procedure. On the contrary, there are provisions in several acts of congress which imply that informations may be filed for criminal offenses. (1 Stats. at Large, p. 98, secs. 7, 32; 2 Stats. at Large, p. 290, sec. 8; 8 Stats. at Large, p. 305, sec. 179; 14 Stats. at Large, p. 145, sec. 179.)

And it has been several times expressly adjudged that offenses not capital or otherwise infamous may be prosecuted in the federal courts by information. *United States v. Waller*, 1 Sawyer C. C. 701 [FIELD and SAWYER, JJ.]; *United States v. Shepard*, 1 Abb. U. S. Rep. 431 (WITHEY, J.); *United States v. Ebert*, 1 Cent. Law J. 205 (KREKEL, J.). And

United States v. Maxwell.

such seems to have been the opinion of Mr. Justice STORY. *United States v. Mann*, 1 Gall. C. C. 3; 1 *Ib.* 552, 554. And see *Walsh v. United States*, 3 Wood & M. 341; Bishop Crim. Prac. secs. 604, 611; *contra*, *United States v. Joe*, 4 Ch. Legal News, 105. In the *United States v. Isham*, 17 Wall. 496. In the *United States v. Buzzo*, 18 Wall. 125, the proceeding by criminal information does not seem to have been questioned in either court. See, also, *Territory of Nebraska, ex rel. etc. v. Lockwood*, 3 Wall. 532; *Stockwell v. United States*, 13 Wall. 542.

We are of the opinion therefore, that offenses not capital or infamous, may in the discretion of the court be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. Where the accusation is a grave one or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offenses, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury and the delay are burdensome and inconvenient both to the government and the defendant.

In this class of cases, most of which are not defended, great and unnecessary expense will be saved by proceeding by information, and we not only think the practice legal, but one which, in cases of this kind, should, with the restrictions above mentioned, be adopted, and encouraged rather than condemned. The courts in this country have never been made the instruments of power in oppressing

United States v. Vernon County.

the citizen, and it can, perhaps, further be safely affirmed that the government has yet to attempt to make use of the machinery of the law for that purpose; and if it should, it seems quite probable that it would be as easy to secure an indictment from a grand jury, as the consent of the court to the filing of an information. This line of observation is, however, scarcely called for, since the court is only concerned on this motion with the lawfulness of a prosecution by information, and is not obliged to vindicate the propriety or policy of this mode of procedure.

The motion in arrest of judgment is overruled.

KREKEL, J., concurs.

JUDGMENT ACCORDINGLY.

UNITED STATES *ex rel.* McKEE v. THE COUNTY COURT OF
VERNON COUNTY.

1. A judgment creditor of a county who has received a warrant on the treasurer which is refused payment, may have a *mandamus* to enforce the collection of a tax to pay such judgment, and is not bound to wait and take his turn among other warrant-holders.
2. When the court will order a *special* tax against a county to pay a judgment; the practice in such cases stated.

(Before DILLON and KREKEL, JJ.)

*Municipal Bonds.—Right of Judgment Creditor to Mandamus.—
Special Tax.—Practice.*

IN this case motion was made by respondent at this term to quash the alternative writ which had been issued requiring respondent to levy and cause to be collected a special tax for the payment of the relator's judgment. It seems that upon representation made by the respondent that there was money in the county treasury for the pur-

United States v. Vernon County.

pose, the court at the last term by mandamus ordered a warrant issued for the amount, but said warrant when presented was not paid. Township organization has been adopted by the county, and May last, the three judges of the county court went out of office and one single judge came into office to continue the court under the new law. The present mandamus was served, as well on the retiring judges as the new judge. The former made return of their departure from office, and the motion to quash was made on behalf of the single judge now constituting the court. The grounds of the motion were:

(1) That it was premature, not showing failure in respondent to comply with any demand.

(2) That this court has not the power to order a special tax for the purpose.

In support of these positions, the township organization law of 1873 was cited by the defendant's counsel, to show the process and machinery therein provided for the management of county affairs and collection of its revenues. And it was urged that the only duty or power of the county court is to levy the tax annually in April, after proper assessment has been; that said relator, although he has a judgment, must have his warrant endorsed by the treasurer—"no funds"—and take his turn with other creditors in succession in obtaining payment of the warrant; that this court could not create a revenue law and appoint officers and levy special taxes every time a judgment is obtained against a municipality. If this be so, it was argued that every time a physician attends a pauper, and gets a warrant for his services, he can put in motion all the machinery of the law and have a special tax levied and collected for his benefit.

Ewing & Smith, for the relator.

C. G. Burton, for the respondent.

United States v. Vernon County.

DILLON, *Circuit Judge*, orally rendered decision, in substance saying: We cannot go through all the maze of procedure proposed by counsel for enforcing the judgments of this court against municipal corporations. If we should adopt the views of the defendant's counsel, our judgments would be reduced to a sham and a farce. The practice in these proceedings is largely settled already in this circuit. Our ordinary course is not to require a special assessment, and levy at a special and arbitrary time, but to have the tax levied and collected with the general annual levy. Such special levy can then be made on the books and collected without much additional expense or trouble, and in the exercise of its discretion the court aims to avoid all unnecessary severity and useless costs. Some delay may thereby be occasioned to the creditor, but in theory of law, he is compensated therefor by interest. This is the method we have taken and carried out in all cases.

When we have the right to order a special levy, we do not hesitate to do so, if it becomes necessary; but if the respondent appears and gives satisfactory assurance that the requisite amount will be embraced in the general levy, and that sufficient will be appropriated therefrom by a proper order to pay the particular debt, in such case a special levy may be dispensed with. We are governed by the circumstances of each case.

In the case at bar, McKee recovered a judgment against Vernon county in November, 1874, whereon execution issued in December and payment was demanded. The execution was returned *nulla bona*. It was the duty of the county court, after what had been done by the relator, to levy a tax the following April, to pay this debt, but it did not do it. It was represented to us at the last term, that funds therefor were in the treasury, and if warrant were drawn the creditor would have a short road to obtain payment. Having received his warrant he was met with response of "no

Orner v. Saunders.

funds," and he is asked to register this warrant and wait for his turn to get his money in the order that warrants are presented. We hold that he is not required to do so.

The motion to quash is refused, and let order go for a peremptory writ on respondent to levy at the next April term, a special tax, at the time when the general annual levy is made for county purposes, to pay the judgment. The costs of the writ served on persons not officers must be paid by the relators.

KREKEL, J., concurs.

ORDERED ACCORDINGLY.

ORNER v. SAUNDERS.

An action by the collector of internal revenue against the deputy collector on his official bond, may be removed from the state court into the federal court, under the act of March 3d, 1875.

(Before DILLON and KREKEL, JJ.)

Removal of Suits.—Act of March 3d, 1875.—Action on Official Bond of Deputy Internal Revenue Collector is a Suit "Arising Under the laws of the United States."

ON motion to remand cause to the state court. The plaintiff was the collector of internal revenue for one of the districts of Missouri, and appointed the defendant his deputy. The defendant gave the bond which the plaintiff by the act of congress was authorized to require and accept. This action, brought in May, 1875, is upon this official bond, and alleges various breaches of the same. The plaintiff in due time, before answer filed, applied to remove the cause into this court under the act of March 3d, 1875, as one "arising under the constitution and laws of the United States."

United States v. Adler.

The removal was ordered, and the defendant now moves to remand the cause.

Philips & Vest, for the motion.

Mack J. Leaming, and *Crittenden & Cockrell*, contra.

DILLON, *Circuit Judge*.—We have no doubt that the cause was properly removed. It is one arising under the laws of the United States. [Rev. Stats. sec. 3148; act of March 3d, 1875, secs. 1, 2, 3; act of February 8th, 1874, sec 12 (18 Stats. at Large, 309); *Osborn v. U. S. Bank*, 9 Wheat. 739.] Indeed, this last act gives this court original jurisdiction of such actions, concurrent with the state courts.

KREKEL, J. concurs.

MOTION DENIED.

THE UNITED STATES v. 17 EMPTY BARRELS, ETC., Adler & Furst, Claimants.

1. Section 3459 of the revised statutes prescribed the notice required and not the previous rules of the court.
2. In an information under section 3453 of the revised statutes, it is sufficient to follow the language of the statute and the allegation held sufficient without an express averment that the taxes on the spirits were not paid.
3. The tools, etc., found and seized in the place where the distilled spirits were found and seized, were, under the averments, subject to seizure and forfeiture.

(Before DILLON, *Circuit Judge*.)

Seizure of Distilled Spirits.—Sections 3453 and 3459 of Revised Statutes Construed.

WRIT of error to the district court.

United States v. Adler.

C. H. Krum, Jeff. Chandler, and H. S. Musser, for claimants (plaintiffs in error).

J. S. Botsford, U. S. district attorney, for the United States (defendant in error).

DILLON, *Circuit Judge*.—The seizure of distilled spirits, raw materials, tools, etc., was made under section 3453 of the revised statutes. The claimants, as owners, applied under section 3459 of the revised statutes for the return of the property seized, and executed the bond therein provided for, which was filed with the proper district attorney. The district court ordered personal service of notice of the pendency of the proceedings to be given to the parties executing the bonds ten days before the term fixed for trial. The required notice was given. A motion was made on a special appearance to quash the notice, because twenty days notice had not been given as required by rule 45 of the United States district courts for the districts of Missouri.

The answer to this objection is that section 3459 of the revised statutes prescribes the mode of proceeding in the case as to notice, and not the rule of the court referred to.

The third article of the information was demurred to and the demurrer was overruled and judgment of forfeiture entered. Without going into detail my judgment is that the allegations of the third article using and following the language of the statute are sufficient in substance. Under this article it is specially urged that it should be alleged that the taxes were not paid on the spirits. But the averment is that the spirits "were in the possession and ownership of the claimants for the purpose of being sold and removed by them in fraud of the internal revenue laws, and with the design to avoid the payment of said taxes." This is sufficient.

Savings Bank v. Publishing Co.

And it is my opinion that the tools, etc., found and seized in the place and inclosure where the distilled spirits were found and seized, were, upon the averments of this article, subject to seizure and forfeiture. It is my opinion, too, that the fourth article is also good, upon a general demurrer. The court cannot judicially notice and on demurrer decide that the averment that certain materials were "raw materials" were not so in the face of the direct allegation of fact to the contrary.

I have some doubt whether the *kind of article* subject to tax, into which it is alleged these "raw materials" were intended to be manufactured for the purpose of fraudulently selling such manufactured article with the design to evade the payment of said tax, ought not to have been specifically averred, yet I am inclined to think this generality of statement would not be sufficient ground of reversal where judgment went upon a general demurrer. But, however this may be, the third count is sufficient to support the judgment.

I have no doubt as to the jurisdiction of the district court.

AFFIRMED.

FARMERS & DROVERS SAVINGS BANK, Appellant, v. KANSAS CITY PUBLISHING COMPANY, Appellee.

The bankrupt company had, before bankruptcy, duly made calls upon its members for the payment of the balance due on their stock, which thus became a debt due by each of them to the company. The company wishing to make a loan of money of the bank, agreed in consideration of an advance by the bank that the bank should collect the calls and apply the amount collected from time to time on the debt created by the advance, and in pursuance of this agreement the company delivered to the bank a list of the stockholders and the amount due from each on the calls, and the bank collected a portion before the bankruptcy: *Held* that the transaction between the com-

Savings Bank v. Publishing Co.

pany and the bank amounted to an *equitable assignment* of the calls to the bank, which was not defeated by the subsequent bankruptcy of the company.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Equitable Assignment of Debt Due by Stockholders for Subscription to Stock.

ON an appeal from an order from the United States district court rejecting claim of appellant as a *secured* claim.

John K. Cravens, for appellant.

Lay & Belch, for appellee.

DILLON, *Circuit Judge*.—The calls on the shareholders having been made before the transaction with the bank, the amount called for was a debt due the publishing company.

It is an established doctrine in equity that "any order, writing, or *act*, which makes an appropriation of a fund amounts to an equitable assignment of that fund," and also that "an assignment of a debt may be by parol as well as by deed." Here the bank advanced the money to the publishing company on the faith of the agreement made at the time, by the publishing company, that the bank should collect the calls and apply them on the debt created by the advance of the bank to the company, and in pursuance of this agreement delivered to the bank a list of the stockholders and the amount of the debts respectively due from them on the calls. A portion of these were collected by the bank before the bankruptcy. The transaction between the company and the bank amounted to an equitable assignment of the calls to the bank which was not defeated by the subsequent bankruptcy of the company. These views will be found fully supported by the following authorities: 2 Story's Eq. Jur. sec. 1047; *Burn v. Cairalho*, 2 Mylne & Craig, 690, 702; *Clemson v. Davidson*, 5 Binney,

Savings Bank v. Publishing Co.

392, 398; *Heath v. Hall*, 2 Rose, 271; S. C. 4 Taunton, 326, 328; *In re Sankey Coal Co.* Law Rep. 9 Eq. Cases, 721; *Gibbs & West's Case*, Law Rep. 10 Eq. Cases, 812; *Gurnsey v. Gardner*, 49 Me. 167; 1 Par. Contr. 228.

The case as made is not within the Missouri statute of frauds. The order of the district court is reversed.

REVERSED.

REPORTS
OF
CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
EASTERN DISTRICT OF ARKANSAS.

In re HANDLIN & VENNY.

Under the bankrupt act (secs. 14 and 36) and constitution of the state of Arkansas of 1868 (art 12, sec. 1), bankrupts who are co-partners are not entitled to separate or individual exemptions out of the partnership effects.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Exemptions out of Partnership Assets.—Constitutional Provision as to Exemptions Construed.

PETITION for review under section 2 of the bankrupt act.

This case came before the court on a question as to the right of individuals composing a bankrupt firm to claim individual exemptions out of partnership effects. The individual schedules of each of the partners aforesaid disclose personal property of Handlin to the amount of \$532.85, and of Venny to the amount of \$150.00. The partnership schedules disclose personal property sufficient to make up

In re Handlin.

the sum of \$2,000 claimed by each of the partners. This latter sum is the amount allowed to "any resident" of the state of Arkansas, as exempt from execution or other final process, by the exemption laws of the state as they existed in the year 1871 (sec. 1, art. 12, of the constitution of 1868).

Each of the partners claims as follows: Handlin, \$1467.15; which, added to his \$532.85, amounts to \$2,000. Venny claims 1,850.00; which, added to his \$150.00, amounts to \$2,000. Hubbard Stone, the assignee of said bankrupt estate, refused to allow the \$1,467.15 and the \$1,850 claimed above, and on the 20th of February, 1875, set apart as exempt, and issued certificates as follows:—

To Handlin, specified articles of personalty to the value of \$532.85; to Venny, same, amounting to \$150,—being the amount of personal property shown by the schedules of each to be their individual property respectively.

To this action of the assignee, the bankrupts by their attorneys, excepted, and the matter was brought before the district court upon the statement of facts herein set forth. Whereupon the action of the assignee, as aforesaid, was by the court disapproved and set aside, and the assignee was *pro forma* ordered to allow each of the bankrupts, Handlin and Venny, the balance claimed by each of them as above stated, out of the partnership effects. The order of the district courts was as follows:—

"The assignee is directed to allow to each of the bankrupts out of the partnership effects a sum which, added to their respective individual effects, will give to each an exemption of personal effects to the value of \$2,000."

The assignee excepted, and brings the matter before the circuit court on a petition for review.

It was admitted that the bankrupts constituted all the members of the firm; that they were adjudged bankrupts on their own petition, prior to the taking effect of the constitution of the state, of 1874, and while section 1, article

In re Handlin.

12 of the constitution of 1868 was in force; and that neither of them had a homestead, or claimed a homestead exemption.

Dodge & Johnson, for the assignee.

N. & J. Erb, for the bankrupts.

DILLON, *Circuit Judge*.—The bankrupt act (sec. 14), after excepting from its operation the household and kitchen furniture and other articles and necessities of the bankrupt, not exceeding in value, in any case, the sum of \$500, also excepts “such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process * * by the laws of the state in which the bankrupt has his domicile.”

The constitution of the state, of 1868, in force until after the bankruptcy here in question, contained this provision:—“The personal property of any resident of this state, to the value of \$2,000, to be selected by such resident, shall be exempted from sale on execution, or other final process of any court, issued for the collection of any debt, contracted after the adoption of this constitution” (art. 12, sec. 1). This provision is self-executing. (*In re Hezekiah*, 2 Dillon, 551.) The bankrupts were co-partners and were adjudged bankrupts as such; one of them had individual assets to the amount of \$532.85, and the other to the amount \$150.00. The firm assets amounted to several thousand dollars, but not enough to pay all the firm debts. Each of the bankrupts claims out of the firm assets a sum sufficient, with the individual property set apart to him, to give him an exemption of personal effects to the value of two thousand dollars. This claim was sustained, *pro forma*, by the district court, and the assignee contests its rightfulness.

Upon the best consideration I have been able to give to the subject, my conclusion is that the claim of the bank-

In re Handlin.

rupts in this behalf cannot be sustained. This opinion rests upon the language of sections 14 and 36 of the bankrupt act, and of the constitutional provision above quoted; upon the general principles of the bankrupt law and the law of partnership, and upon the weight of authority upon the subject. Whatever property is exempted by section 14 of the bankrupt act is excepted from the operation of the act, and the title to it does not vest in the assignee. This is not denied, and has been frequently decided.

Section 36 relates to the bankruptcy of partnerships, and contains the provision that when persons who are partners in trade are adjudged bankrupt, "a warrant shall issue, upon which all the joint stock and property of the co-partnership, and also all the separate estate of each of the partners, shall be taken, *excepting such parts thereof as are herein-before excepted.*" That is, *all* of the firm property is to be seized on the warrant, and all of the individual property of the partners, except such of the individual property as is exempted to the partners severally. And the further provision is that, after deducting expenses and disbursements, "the *net proceeds* of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors," etc. Taken all together, this language does not contain anything to favor, but much to contravene, the notion that individual exemptions should be allowed out of the partnership estate. And the same observation applies to the language of the constitutional provision.

But conceding that the language of the bankrupt act and of the constitution of the state is not so clear to this end as to exclude doubt, the general principles of the law are against the allowance of the exemption claimed. Where, as in this case, the partnership and all its members are declared bankrupt, the firm is treated as being dead, except to close up its affairs. There is no exemption to the *firm*, as

In re Handlin

such; nor is it contended that there can be. But each of the partners claims an individual exemption to the amount of two thousand dollars out of the firm property, and at the expense of the firm creditors; and if the claim is valid, it would be equally so if there were six partners, instead of two. It is a claim not depending upon the amount of capital which the partner making the claim contributed to the firm, nor upon the state of the accounts between him and his co-partners. He may never had put a dollar of capital into the firm, or he may have drawn out all of his capital and owe the firm, and yet it is insisted that, not only as against his co-partners, but as against the creditors of the firm, he may, in default of not possessing individual estate, lay his hands upon two thousand dollars of the joint estate and appropriate it as exempt. This I am sure he could not do before bankruptcy without his co-partner's consent, and after the bankruptcy the co-partner is incapable of giving any consent to affect rights fixed by that event.

The pretension set up in this case, whether considered with reference to the rights of co-partners or the rights of the firm creditors, cannot be maintained. The case might be different as to mere joint ownership where no partnership relation existed, but it is not necessary to consider this point.

While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate, at the expense of the joint creditors. (*Pond v. Kimball*, 101 Mass. 105; *Guptil v. McFee*, 9 Kansas, 30, a well-considered case, following *Pond v. Kimball*, and disapproving *Stewart v. Brown*, 37 N. Y. 350; *Burns v. Harris*, 67 North Car. 140; *Bonsall v. Comly*, 44 Pa. St. 442, 447; *In re Blodgett*, 10 Bankr. Reg. 145; *In re Hafer*, 1 Bankr. Reg. 147; *Amphitel v. Hibbard*, Sup. Ct.

In re Cohen.

Mich. 1874; *In re Price*, 6 Bankr. Reg. 400; *Wright v. Pratt*, 31 Wis. 99. *Contra*: *In re Young*, 3 Bankr. Reg. 140; *In re Rupp*, 4 *Ib.* 75; *Stewart v. Brown*, 37 N. Y. 350; *Radcliff v. Wood*, 25 Barb. 52; *In re McKercher*, 8 Bankr. Reg. 409.)

REVERSED.

In re COHEN, a Bankrupt.

Under the revised statutes (sec. 5045), a bankrupt is entitled to have property exempted to the amount allowed by the constitution and laws of the state in which he is domiciled, as existing in the year 1871, although the amount of such exemption was reduced by the constitution and laws of the state after 1871, and before the proceedings in bankruptcy.

(Before DILLON, Circuit Judge.)

Bankrupt Law.—Revised Statutes, Sec. 5045 Construed.—Exempted Property.

ALBERT COHEN, domiciled in the eastern district of Arkansas, was adjudicated a bankrupt by the district court of that district, on July 26, 1875. By the new constitution of Arkansas, which went into effect October 30, 1874, there is exempted from sale on execution specific articles of personal property, to an amount not exceeding \$500, in addition to wearing apparel, etc. By the former constitution of the state, in force from 1868 until the new constitution went into effect, October 30, 1874, there was exempted personal property to the amount of \$2,000. The indebtedness of the bankrupt was contracted in part before, and in part after, the new constitution went into operation. The assignee set apart to the bankrupt specific articles of personal property of the value of \$500 allowed by the bankrupt act, and to the value of \$500 allowed by the present constitution. The

In re Cohen.

bankrupt excepted to this, and claimed \$2,000 as exempt. The district court sustained the bankrupt's exceptions to the assignee's schedule of exempted property, and ordered the assignee to set aside to the bankrupt, as exempted to him under the bankrupt act, property to the value of \$2,000.

To this order the assignee excepted, and brings the decision of the district court here for review.

As applicable to this case, the 14th section of the original bankrupt act exempted such property to the bankrupt as was exempted "by the laws of the state in which the bankrupt had his domicile, etc., to an *amount not exceeding* that allowed by such state exemption laws in force in the year 1864."

On June 8, 1872 (17 Statutes at Large, 334), congress amended the above, as follows: "by striking out the word 1864 and inserting, in lieu thereof, 1871."

On March 8, 1873 (17 Statutes at Large, 577), congress passed "an act to declare the true intent and meaning of the act of June 8, 1872, *supra*; and therein declared "such true intent and meaning to be, and it is hereby enacted that they shall be, *the amount allowed* by the constitution and laws of each state, respectively, as existing in the year 1871; and that such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment and decree of any state court, any decision of any such court, rendered since the adoption and passage of such constitution and laws, to the contrary notwithstanding."

This provision, without substantial change, is carried into the revised statutes (sec. 5045).

A. W. Bishop and Compton & Martin, for the assignee.

Wilshire & Allen, for the bankrupt.

In re Cohen.

DILLON, *Circuit Judge*.—The constitution of the state of Arkansas in force in 1871, and until October 30, 1874, allowed an exemption to the amount of \$2,000. The constitution of 1874, now in force, reduced the amount of the exemption to \$500. The question is, whether the provision, in this regard, of the old or of the new constitution applies to the case of this petitioner, he having been declared a bankrupt since the new constitution went into operation. I have had some difficulty in reaching a conclusion entirely satisfactory to my own mind; but, after viewing the subject in its various lights, my judgment is, that the amount allowed by the constitution in force in 1871 is that to which the bankrupt is entitled. Such is the language of the act of March 3, 1873 (17 Statutes at Large, 577), which is carried into the revised statutes (sec. 5045); and I see no good reason for not giving to the words of the act their natural meaning and effect. Congress, in an act evidently intended to favor the exemption, dropped the words "not exceeding," etc., in the prior legislation, and substituted words which fixed the amount of the exemption to be "the *amount allowed* by the constitution and laws of each state, respectively, as existing in the year 1871." This was done *ex industria*; and the opposite construction would, as it seems to me, defeat the purpose of congress, as shown by the history of the legislation on this subject. The ruling of the district court is, accordingly, affirmed.

AFFIRMED.

REPORTS
OF
CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF NEBRASKA.

FIRST NATIONAL BANK OF OMAHA v. THE COUNTY OF DOUGLAS,
and EDWARD F. McSHANE, its Treasurer.

1. National banks may, by reason of their character as such, sue in the federal courts.
2. Where no remedy exists to recover back illegal *state* taxes when paid into the treasury, equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of *county* as well as state taxes, embraced in the same collection warrant and levy.
3. Taxation by state authority of the capital stock of a national bank, invested in United States securities, restrained.

(Before MILLER, Circuit Justice.)

Taxation of National Banks.—Jurisdiction of Equity to Restrain Illegal Taxes.—Federal Judicial Jurisdiction in Respect of National Banks.

THIS was a bill in equity for an injunction to restrain the collection of taxes levied by the commissioners for the de-

Bank of Omaha v. Douglas County.

fendant county, on behalf of the state of Nebraska and of the county, upon the capital stock of the plaintiff.

At the May term, 1873, a motion was made by *Mr. Woolworth*, counsel for the bank, to the court, Mr. Justice MILLER presiding, for an injunction, which motion was opposed by *Mr. Cowin*, counsel for the county, on the ground of want of jurisdiction.

MILLER, *Circuit Justice*, held: —

1. National banks may, by reason of their character as such, sue in the federal courts.

2. A part of the taxes sought to be restrained being for the state of Nebraska, and the county treasurer being by the revenue law of the state required to pay the same into the state treasury when they are collected, and no provision being made by law for an execution or other proceeding against the state for the recovery of them back if illegally exacted, the plaintiff has no adequate remedy at law, and equity will intervene by injunction to restrain the collection of such illegal taxes.

3. When a county treasurer holds one warrant in which he is commanded to enforce payment of both state and county taxes, which for a common reason are illegal, equity, having jurisdiction to restrain the treasurer from enforcing the payment of the state taxes, may proceed to the determination of the validity of the county taxes as well, and restrain them also.

4. The First National Bank of Omaha filed its bill against the county of Douglas and its treasurer, to have it declared that the taxes of 1870 and 1871, levied by the state of Nebraska and the county of Douglas upon the capital stock of the bank, were illegal, and to restrain that officer "from making distress upon the property of the plaintiff, as he threatened to do, and from all other proceedings to enforce the payment" of the taxes. On motion for an injunction

Union Pacific Railroad Company v. Lincoln County.

the defendant objected to the jurisdiction of the court as a federal court, and also as a court of equity. *Held*, that there was jurisdiction to entertain the bill and allow an injunction.

INJUNCTION ALLOWED.

NOTE.—*Suits by National Banks in Federal Courts*: Mr. District Judge WELKER, of the northern district of Ohio, in the case of the *Commercial Bank of Cleveland v. Simmons* (6 Chicago Legal News, 344), has recently decided that a national bank may sue in the United States circuit court of the district where the bank is located, upon notes endorsed to it by the payee, though the defendant is a resident of the same district. The United States circuit court for the eastern district of Missouri, at the March term, 1875 (present DILLON and TREAT, JJ.), decided the same point.

Taxation of shares in national banks, see *First National Bank, &c. v. Douglas County*, *ante*, p. 297.

Equity jurisdiction to restrain illegal taxation, considered in the Missouri tax cases, *ante*, pp. 13, 22, 25.

UNION PACIFIC RAILROAD COMPANY v. LINCOLN COUNTY.

1. Upon proper application the issue of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance.
2. An act of the legislature of Nebraska in respect to the issue of such bonds, construed, and it is held, where the statute required such bonds to be paid in *ten* years, that a vote authorizing bonds to run *twenty* years was such a material departure from the statute that the court would enjoin the issue of the bonds.

(Before DILLON and DUNDY, JJ.)

Injunction to Restrain Issue of Bonds by Public Corporations.

THIS is a bill by the Union Pacific Railroad Company, as a large property owner and tax-payer in the county of Lin-

Union Pacific Railroad Company v. Lincoln County.

coln, in behalf of itself and other tax-payers similarly situated, to restrain the proposed issue of \$30,000 of the bonds of the county, to borrow money to aid in erecting public buildings therein. The county commissioners ordered an election to be held at the different voting precincts in the county, on the 25th day of May, 1873, to vote on the proposition to issue \$30,000 in the bonds of the county to bear ten per cent interest and maturing in twenty years, and also to levy annually a tax sufficient to pay the interest of said bonds and the principal at maturity, for the purpose of building a court house and jail. The proposition carried, and the bill is brought to restrain the issue of the bonds. The bonds proposed to be issued are negotiable in form, with interest coupons attached, for \$500 each, payable August 1st, 1892, or at the option of the county, at any time after 1880. Each bond contains a recital that it is authorized by sections 19 and 26, and section 28 of chapter 9, of the revised statutes of the state, in pursuance of the vote of the 25th day of May, 1873.

O. P. Mason and *T. F. Gantt*, for the county.

A. J. Poppleton, *E. Wakely*, and *John D. Howe*, for the plaintiff.

DILLON, *Circuit Judge*.—Upon consideration we hold :

1. That the act of the legislature of the state of Nebraska, of February 15, 1869, and the amendatory act of March 3, 1870, which authorize " any county or city to issue bonds to aid in the construction of any railroad, or other work of internal improvement," have no application to the issue of bonds by a county for the erection of public buildings therein; and, therefore, the legality of the proposed issue of bonds by the county in the case at bar can derive no support from these enactments.

Union Pacific Railroad Company v. Lincoln County.

2. That the only authority for the issue of such bonds in this state is that which is recited in the bonds here proposed to be issued, viz: Sections 19 to 28 of chapter 9, of the revised statutes of the state.

3. Section 19 gives the county commissioners "power to submit to the people of the county, at any regular special election, the question whether the county will borrow money to aid in the construction of public buildings." The mode of submitting is prescribed in section 21, and section 22 provides as follows: "When the question submitted involves the borrowing of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes, and no vote adopting the question proposed shall be valid unless it likewise adopts the amount of tax to be levied to meet the liability incurred." "Sec. 23. The rate of tax levied shall in no case exceed three mills on the dollar on the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, the rate shall be such as to pay the debt in *ten* years."

It is our judgment that the legislative intention here is to require the debt created to borrow money to erect public buildings to be paid in ten years, and the requirement expressly is that a rate of tax shall be voted and levied sufficient to pay the debt within that period. This provision is defeated if the county may vote to create a debt payable in twenty years, and to levy an annual tax during that period, and such was the proposition which was, in this instance, submitted to, and adopted by, the voters. If the tax is raised in ten years sufficient to pay the debt, the debt ought to be such an one as that the tax may be applied to its payment, for the tax is "specially appropriated and constituted a fund distinct from all others" for this purpose. A construction of this legislation is not admissible by which money to pay the debt may be raised years before the debt itself is payable.

Union Pacific Railroad Co. v. McShane.

As this is decisive against the right of the county commissioners to submit, or the people to adopt, the proposition for the issue of bonds to run *twenty* years, it is not necessary to notice the other grounds for the injunction presented in the bill. It may be that if these bonds were issued and in the hands of *bona fide* holders for value, they could be enforced against the county; but the issue of such bonds will be enjoined upon proper application, when the statute in matters of substance has not been complied with. An order will be entered denying the motion to dissolve the injunction heretofore allowed, and continuing the writ in force.

ORDERED ACCORDINGLY.

DUNDY, J., concurs.

NOTE.—In the case of the same plaintiff, at the same term, to restrain Merrick county from issuing railway aid bonds, under the act of February 15, 1869, the court, on demurrer to the bill, held, under section 31 of the revised statutes of 1866, even where the notice of the question submitted to the voters of a county was published in a newspaper, that it was essential to the validity of the vote that "a copy of the question submitted should be posted up at the places of voting." In this case it was alleged that the notice was not thus posted at the place of voting, in a town, the vote in which controlled the result in favor of the proposition. See *Union Pacific R. R. Co. v. Merrick*, *post*.

THE UNION PACIFIC RAILROAD CO. v. EDWARD C. MC-SHANE, Treasurer, *et al*.

1. Lands for which a patent has issued to the Union Pacific railroad company are taxable by the authorities of the state of Nebraska, notwithstanding the proviso in section 8, of the act of July 1, 1862 (12 Stats. at Large, 489), which subjects lands not sold or disposed of by the company within three years from the completion of the road to settlement and pre-emption at \$1.25 per acre. Case in judgment distinguished from the *Railway Co. v. Prescott*, 16 Wall. 608.

Union Pacific Railroad Co. v. McShane.

2. Said proviso construed and the respective rights of the company and persons proposing to settle on and pre-empt the lands of the company stated.
3. A bill by the railroad company joining as defendants the various counties through which this railroad runs, is not multifarious where the question on which the case turns is common to all, and the counties are agencies of the state as to that part of the taxes which they must pay into the state treasury.
4. Where in addition to the illegality of the tax, the bill shows that if not enjoined a multiplicity of suits will arise, and a cloud be cast upon the owner's title, and that he has no adequate remedy at law, it presents a case of equity cognizance.

(Before DILLON, Circuit Judge.)

Power of State to Tax Land Grant of the Union Pacific Railroad Co.—Remedy in Equity.

THIS is a suit brought by complainant to restrain the several county treasurers, in which the lands granted by the United States, in aid of the construction of its railroad, by the acts of congress July 1, 1862, and July 2, 1864 (12 Stats. at Large, 489; 18 Stats. at Large, 856), are situated, from advertising and selling the same in satisfaction of state, county, and school taxes, levied thereon for the year 1872, and becoming due and delinquent May 1, 1873.

The bill alleges in substance the incorporation of the company, its acceptance of the acts of incorporation, the fixing the eastern terminus, the approval of the route, and the construction and operation of the road to its western terminus, and the examination and acceptance by commissioners appointed by the president; that, thereafter, suggestions having been made that the road was not built in full compliance with the law, under authority of a joint resolution of congress of April 10, 1869, the secretary of the interior appointed a commission consisting of five eminent citizens of the United States, to examine and report whether the road was completed in all respects as required by law; that

Union Pacific Railroad Co. v. McShane.

said commission made such examination, and on the 30th of October, 1869, reported that a further expenditure of \$1,586,100 would be necessary for that purpose, and that thereupon the secretary of the interior suspended the issue of patents to granted lands; that the whole of said work has not been accepted by the government as completed; and that the company is the owner of the lands derived from the grant contained in the acts of congress aforesaid, situated in the several counties and described in the several schedules to the bill, having never disposed of the same by way of mortgages.

The bill also alleges the assessment and levy, by the proper authorities, of state, county, school and other taxes in the respective counties, in amount \$104,180.51, and that the several treasurers of the several counties are proceeding, under warrants issued for that purpose, to advertise and sell said lands in satisfaction of said taxes (as well as by seizure of the cars, locomotives, and trains of complainant); that such sale and seizure will result in a multiplicity of suits and irreparable injury, for which no adequate legal remedy exists; and that the value of the lands situated in each county exceeds the sum of \$500. No question is made upon the regularity of the proceedings in assessing, levying, or enforcing the tax.

The bill further alleges that all lands situated within the ten miles limit have been selected and listed and certified to the company by the commissioner of the general land office, and the land office fees required upon the entry thereof, paid by the company, but that the cost of surveying the same has not been paid; that the lands situated outside the ten miles limit have neither been selected nor certified to, nor the land office or surveying fees paid by the company; that the amount of such taxes so sought to be collected, which are levied for state purposes, and will be paid to the state, if collected, is \$17,711.17.

Union Pacific Railroad Co. v. McShane.

It is thereupon claimed that, under the provisions of section 3, of the act of July 1, 1862, and section 21, act of July 2, 1864, the lands are not subject to state taxation, and injunction is invoked to restrain the treasurers from proceeding to collect.

A temporary injunction being granted, at the November (1873) term the case was heard upon general demurrer and the demurrer overruled.

The answer, filed January 5, 1874, admits most of the allegations of the bill, but denies that the secretary of the interior has suspended the issue of all patents, and alleges the issue of patents to certain of the lands in controversy; alleges the making of a mortgage by the company of said lands, in 1867, claiming that such mortgage is a disposal thereof, within the meaning of section 3, act of July 1, 1862; denies that land office and surveying fees have not been paid as alleged in the bill; denies that the road was not accepted, as completed, by the United States in 1869, and insists that the question of exemption of said lands from taxation is not common, and the same in respect to each and all the said defendants as alleged in the bill, and that the bill is therefore multifarious.

The answer also alleges that the lands in controversy had been surveyed in 1869; that since 1865 the complainant has exercised ownership over the same by advertising and offering the same for sale, and that they are treated by the government as private property.

Replication being filed and proofs taken, the case now comes on for final hearing.

As to the status of the lands, the evidence taken by the defendant shows (nor is it denied by the complainant) that, at the date of the assessment and levy of the tax in question, the lands in controversy had been surveyed, appraised, offered for sale, and mortgaged. It also appears from the proofs that of the lands situated within the ten miles limit,

Union Pacific Railroad Co. v. McShane.

every alternate odd section to which the company claimed to be entitled had been patented previous to the assessment and levy of the tax; and that the residue of the grants within like limits was unpatented, and that the costs of surveying had not been paid on any lands situated within the ten miles limit, whether patented or unpatented, because not required by the interior department.

In respect to the lands situated between the ten and twenty miles limits, it appears from the proofs that they had all been selected, listed, certified, and the land office fees and cost of surveying paid, and every alternate odd section of those claimed by the company patented—the residue being unpatented.

Upon the report of the committee of "eminent citizens" under the joint resolution of April 10th, 1869, that \$1,586,000 be required for supplying deficiencies in the road, Mr. Cox, the secretary of the interior, November 3d, 1869, to indemnify the government, ordered that only one-half the lands to which the company would otherwise be entitled should be patented, and the patents for the rest be suspended until further directions from the department. He directed patents to issue beginning at Omaha and working westward for the odd numbered sections 1, 5, 9, etc., and that patents for sections 3, 7, etc., be not issued until further orders. In February, 1871, a patent issued to the company under this order for about 640,000 acres of land, the department refusing to issue a patent for the other half. In February, 1874, Mr. Delano, then secretary of the interior, refused to rescind the order of his predecessor, and so patents for one-half of the company's land are still withheld as security for the completion of its road, and matters reported deficient or not up to the required standard.

A. J. Poppleton and E. Wakely, for plaintiff.

Clinton Briggs, J. C. Cowin, and others, for the defendants.

Union Pacific Railroad Co. v. McShane.

DILLON, *Circuit Judge*.—The railroad company claims that the lands upon which the state authorities have levied taxes for the year 1872, are not subject to taxation for two reasons: one based upon a provision in section 3, of the act of July 1st, 1862, and the other of July 2d, 1864. These will be noticed in their order.

Section 3 of the act of 1862, is the one which makes the grant of land to the company within a specified distance of its line of road, and it concludes with this provision: "And all such lands so granted by this section, which shall not be sold or disposed of by the company within three years after the entire road shall be completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding \$1.25 per acre, to be paid to the company."

Section 4 directs patents to issue for lands on each side of the road from time to time on the completion of sections of forty (afterwards reduced to twenty) consecutive miles, which patents it is enacted shall "convey the right and title to said lands to said company."

Section 21 of the amendatory act of 1864 provides "that before any land granted shall be conveyed to the company * * there shall first be paid into the treasury of the United States, the cost of surveying, selecting, and conveying the same," etc.

From the bill and the proofs, it appears that the work of constructing the road was commenced in 1865, that the road was completed and accepted from time to time in sections of forty and twenty miles, and that the entire road was completed by May 10th, 1869, and has since that time been in constant use and operation.

In 1867 the company "for the purpose of raising money to aid in the construction of its railroad," mortgaged its land grant to secure the payment of bonds for about ten millions of dollars. This mortgage is still in full force.

Upon this legislation and upon this state of facts, the first

Union Pacific Railroad Co. v. McShane.

ground taken by the company upon which it insists that the state of Nebraska has no right to tax any of its lands, whether patented or not patented, is, that by the provision in section three above mentioned, these lands are "subject to settlement and pre-emption like other public lands, at a price not exceeding \$1.25 per acre, to be paid to the company." In support of this proposition the counsel for the company rely upon the case of the *Kansas Pacific Railway Co. v. Prescott*, 16 Wall. 603.

I confess to some difficulty in distinguishing that case from the one now before the court; but upon the best consideration I have been able to give to the subject, I am of opinion that that case does not control this one, so far at least as regards the lands to which this company holds the patent of the United States.

There are two elements in that case which, in material respects, distinguish it from the present one so far as the plaintiff company has received a patent for its lands; the first is, that in that case the taxes were assessed before any patent had been issued; and the second is, that they were assessed at a time when by reason of the non-payment of the costs of surveying, etc., required by section twenty-one of the act of 1864, the company was not entitled to a patent.

If, in that case, the cost of surveying the land had been paid, and a patent for the land there in question had actually been issued before the taxes were assessed, it would seem that a different result would or might have been reached.

It is not my purpose to discuss at length the respective rights of the general government and of the railroad company in the lands, after the lapse of three years from the completion of the road, nor whether a mortgage of the lands is such a "disposition" of them as would defeat the right of settlement or pre-emption. The proofs show that

Union Pacific Railroad Co. v. McShane.

the company has dealt with these lands, and is now dealing with them as if they were in all respects their absolute property. They are advertising and selling them at their own prices and upon their own terms, and they do not recognize the rights of the public to settle upon and pre-empt them, and to buy them at \$1.25 per acre. On the other hand, neither congress nor the interior department has taken any steps to subject these lands to settlement and pre-emption, and the public are denied the right to the benefit of the privilege or reservation in their favor.

I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding \$1.25 per acre, being payable to the company instead of the government.

This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the “right and title to the lands.” During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but “subject” to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company

Union Pacific Railroad Co. v. McShane.

from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction — which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation.

If this be a correct view of section three of the act of 1862, it results that the lands of the company so far as they are patented, are subject to taxation by the authority of the state, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with and will not defeat the rightful authority of the state to tax the lands.

As to the lands which have been patented to the company, I am of the opinion that it is the substantial owner, and that equity should not relieve it from taxation in respect thereto, because it may be compelled to sell particular tracts here and there to actual settlers at \$1.25 an acre.

The other ground of exemption, in view of the decision in the *Prescott* case, may be disposed of briefly. Upon the proofs in this case, which on some points are indefinite, I am of opinion that lands which have not been patented, either because the costs of surveying required by section twenty-one of the act of 1864 have not been paid, or because patents have been withheld by the interior department as indemnity to make good the deficiencies in the construction of the road, are not taxable, and to this extent the injunction will be continued in force. But as to all

Union Pacific Railroad Co. v. McShane.

lands which have actually been patented to the company the injunction will be dissolved. It is true that as respects patented lands within the ten miles limit, Mr. Davis, the land agent of the company, states that the surveying fees have not been paid, but he also states that the reason why they were not paid was that the interior department did not require it.

It does not appear that there are any lands not patented which have been fully earned and set apart to the company upon which all fees have been paid, and for which the patents are not retained by the government for its own security, and therefore for all practical purposes, I hold that the lands in this case may, upon the proofs before the court, be divided into two classes: 1st, those which are taxable; 2d, those which have not been patented and which are not shown to be taxable.

Without stating at length the reasons for the view, my opinion is that the bill is not multifarious by reason of the joinder of the various counties through which the road runs, as the question on which the case turns is common to all, and the counties are in fact the agencies of the state as to that part of the taxes which they must pay into the state treasury.

I am also of the opinion that the bill presents a case of equitable cognizance so far as the tax sought to be enjoined is illegal, because of the multiplicity of suits which the sale of many hundred separate tracts of land would engender; because of the cloud which, under the legislation of Nebraska, would be cast upon the title of the lands by a tax sale and deed; because so far as the taxes going to the state are concerned, there is no remedy at law to recover them back (*National Bank v. Douglas Co.*, May term, 1873, decided by Mr. Justice MILLER, *ante*, p. 298); and because the threatened seizure of the trains of the company in a new and remote region, causing delay and injury, should not be

Hunnewell v. Burlington and Missouri River Railroad Co.

permitted in order to enforce an illegal tax. Let a decree be drawn dismissing the bill as to all lands embraced in the company's patent of February 23, 1871, and making the injunction perpetual as to the lands which have not been patented to the company.

DECREE ACCORDINGLY.

NOTE.—The decree in the foregoing case was rendered in July, 1874, and cross-appeals taken. By reason of its character and importance the case was advanced by the supreme court and a decree rendered January, 1875, affirming the decree of the circuit court both as to the patented lands and the lands not patented. The following propositions as stated by Mr. Justice MILLER, were ruled by the supreme court:

1. *The Railway Co. v. Prescott*, 16 Wall: 603, modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company to constitute an exemption of those lands from state taxation.

2. But affirmed so far as it holds that lands on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from state taxation.

3. But where the government has issued the patent the lands are taxable, whether payment of those costs have been made to the United States or not.

HORATIO H. HUNNEWELL, suing for himself and others, v.
THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY
IN NEBRASKA, THE COUNTY OF CASS, and other counties.

1. The land grant to the Burlington and Missouri River Railroad Company (act of July 2, 1864, sections 17, 20, 13 Stats. at Large, pp. 356, 364), is not subject to the proviso in section 3 of the original act of July 1, 1862 (12 Stats. at Large, 489), giving to the public the right of settlement and pre-emption if the lands granted be not sold or disposed of within three years after the entire line of the road is completed.

Hunnewell v. Burlington and Missouri River Railroad Co.

2. Where the lands had not been fully earned by the railroad company in 1871, and the cost of surveying paid as required by section 21 of said act of July 2, 1864, before the period of assessing lands for 1872 had passed, it was held that the lands were taxable, although the company did not pay the local land officer's fees until a few days after the period for making the assessment for 1872 had expired.

(Before DILLON, Circuit Judge.)

Construction of Land Grant to the Burlington Railroad Company. — Taxability of its Lands. — Act of July 2, 1864, Sec. 21, Construed.

THIS is a bill to restrain the collection of taxes levied upon the lands granted by congress to the defendant railroad company. It is filed by the plaintiff, as a stockholder of the company, after he had represented to its board of directors the impropriety of paying the taxes, and requested them to bring an action to enjoin their collection, or otherwise take efficient measures to protect it therefrom, and after they had declined to do so, because it would be a difficult and unpopular step to take.

The taxes complained of were, in 1872, levied by the several counties made defendants, in which the lands are situated, and were, in point of form, regular in all respects. They are sought to be avoided on the ground that the lands upon which they were levied were not taxable, on account of certain provisions of the acts by which they were granted to the company. The provisions of these acts of congress, upon which the plaintiff's claim rests, are the 8d and 18th sections of the act of 1862 (12 Stats. at Large, pp. 489, 492), and sections 18, 19, 20, and 21 of the act of 1864 (13 Stats. at Large, pp. 356, 364).

The work of constructing the railroad was commenced on the 4th of July, 1869, at Plattsmouth, on the Missouri river, and was prosecuted with such vigor that it was completed to a junction with the Union Pacific Railroad, at Kearny Junction, in the fall of 1872, and its last section was, on the

Hunnewell v. Burlington and Missouri River Railroad Co.

4th of November of that year, accepted by the commissioners. Early in its enterprise the company mortgaged its lands to raise the means, or a part thereof, with which to carry forward the work, to which purpose those means were applied; and it has applied the proceeds arising from the sale of the lands, and has pledged the proceeds thereof, to that purpose.

On the 7th of March, 1872, the company paid to the United States the cost of surveying the lands opposite the first one hundred and forty miles of the road, including field work and office work, and, on the 6th of May, 1872, paid the cost of surveying the lands opposite the remainder of said road.

On the 19th and 20th days of April, and the 1st and 2d days of May, of the same year, the fees of the register and receiver in respect to said lands were paid.

The revenue laws of the state require the assessors to meet for the purpose of equalizing their assessments on the first Monday in April, and to return their rolls to the county clerk on the second Monday of that month, and the county commissioners to sit as a board of equalization on the third Monday and for the two succeeding days. The sessions of said board for 1872 closed on the 17th day of April.

The proper duplicates and warrants to collect and enforce the tax were placed in the hands of the treasurers of the several counties which are impleaded in the bill, and, when the injunction was allowed, they were about to sell the lands. About one-half of the taxes go to the state.

The cause is before the court on final hearing on the bill, answer, replication, and proofs. This suit relates to lands along the first one hundred and forty miles of the company's road. Another suit by the same plaintiff relates to lands along the residue of the road.

James M. Woolworth, for the plaintiffs.

Clinton Briggs, G. B. Scofield, Bowen & Laird, Brown & England, for the counties.

Hunnewell v. Burlington and Missouri River Railroad Co.

DILLON, *Circuit Judge*.—The taxes for the year 1872 upon lands granted by congress to the Burlington and Missouri River Railroad Company in Nebraska, and levied thereon by authority of the state, are sought to be restrained upon two principal grounds. One of these is temporary, and applies alone to the taxes of 1872; the other is permanent, and applies, if well founded, to the lands so long as they shall remain unsold and not disposed of by the railroad company. We notice the last objection first, for if it is sound the other is immaterial.

The Burlington company's grant is contained in sections 19 and 20 of the act of July 2d, 1864 (13 Stats. at Large, 356, 364), this being the amendatory act under which, in connection with the original act of July 1, 1862, the Union Pacific Railroad and its branches were constructed.

Section 3 of the original act of 1862 made a grant of lands to the Union Pacific Railroad Company, within certain limits on each side of its road, with a proviso that "all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." This proviso was under consideration by the supreme court of the United States in the case of the *Kansas Pacific Railroad Company v. Prescott*, 16 Wall. 608. It is maintained by the plaintiffs that the effect of that proviso, as construed by the supreme court, is to exempt from taxation all lands granted to the companies by the acts of 1862 and 1864, which have not been actually sold or otherwise absolutely disposed of; and it is also maintained that the mortgage of the lands by the company is not such a "sale or disposition" of them as will defeat the right to settle upon and pre-empt them. After a careful consideration of the language of sections 18, 19, and 20 of the act of

Hunnewell v. Burlington and Missouri River Railroad Co.

1864, upon which the rights of the Burlington company rest, and a comparison of it with the language used in respect to the main company and its branches, my judgment is that the grant to the Burlington company is an independent grant, not made by referring to the grants to the other companies, and, therefore, that section 3 of the act of 1862, whatever may be its scope and effect, has no application to the Burlington company. This last road was not a part of the original scheme; it was to have no government bonds; and was simply aided as many other roads in Iowa, Wisconsin, Minnesota, and other states had been, by a grant of public lands. As to the effect of the proviso in section 3 upon the status of lands to which it applies, see the case of the *Union Pacific Railroad Company v. McShane et al.*, decided at the same time with the present case (*ante*, p. 303).

The other alleged ground of exemption from taxation is that, at all events, the lands were not taxable for 1872, because the company's right to them was not perfected until after the time when, under the laws of the state, property can be taxed. The proofs show that the road of the Burlington company had been constructed and accepted as being complete for the distance of one hundred and forty miles by December 18, 1871. The balance of the distance, fifty and three-fourth miles, was accepted as complete November 4, 1872.

On the 7th day of March, 1872, the company paid all the costs of surveying the lands, including field work and office work, for the first one hundred and forty miles, and the cost of surveying the balance of the lands on the 6th day of May, 1872.

The plaintiffs claim that, under the revenue laws of the state, no property can be taxed which becomes taxable after the third Monday in April, and that this time ended by the 17th day of that month, in 1872, when the board of equalization closed its session. And their further claim is that, as

Hunnewell v. Burlington and Missouri River Railroad Co.

the register's and receiver's fees were not paid until the 19th day of April, 1872, the company had no taxable interest in the land until this date, which was too late to make the land taxable for that year; and to support this position the case of the *Kansas Pacific Railroad Company v. Prescott*, 16 Wall. 603, is relied on.

Section 21 of the act of 1864 is in these words: "Before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company; which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the commissioner of the general land office for the prosecution of the survey of the public lands along the line of said road; and so, from year to year, until the whole shall be completed, as provided under the provisions of this act."

The proofs show that the lands for the first one hundred and forty miles were fully earned in 1871, and that the company was then entitled to patents therefor, on the payment of "the cost of surveying, selecting, and conveying the same," and that this payment was made on March 7, 1872; and if the right of the company to the lands was then perfect, it is conceded that, if taxable at all, they were taxable for the year 1872. It is said, however, that because the register's and receiver's fees were not paid until April 19, the lands were not before that time taxable.

It does not appear from the proofs when the certificates and patents were dated or delivered to the company, and, whatever may be the facts in this regard, I am of opinion that the fees to the registers and receivers of the local land offices, under the act of July 1, 1864 (13 Stats. at Large, 335), are not embraced within those required to be paid by

Dillon v. Union Pacific Railroad Co.

the aforementioned section 21 of the act of 1864. These are fees for "locating," not for "selecting" and "conveying," the land. But, again, it may be remarked that the cost of surveying was paid in time to make the lands taxable; the work of selecting the lands was done by the company without, so far as shown, any expense to the government, and for the cost of conveying it does not appear that the government makes or has any claim.

The result is that the bill in No. 284, which relates to counties along the first one hundred and forty miles of the defendant company's road, must be dismissed, and the bill in the second case, as to lands west of the west line of range 7, in Clay county, where the road was not completed until the fall of 1872, must be sustained, and the injunction made perpetual; but as to lands east of said west line of range 7, in Clay county, the bill must be dismissed.

DECREES ACCORDINGLY.

NOTE.—The decree in the above case affirmed, on appeal, January, 1875.

JOHN DILLON v. THE UNION PACIFIC RAILROAD COMPANY.

1. The courts of Great Britain and America have established the general doctrine of the non-liability of the employe for an injury of one servant caused by the negligence of another servant in the same common employment; and this doctrine of general jurisprudence, as it involves no *federal question*, is no more open to judicial denial in the federal courts than in the state courts, or the ordinary common law tribunals.
2. But the employer, though he may act through others, is bound to use ordinary care in providing competent servants and safe materials and structures, and is responsible to any servant who is injured by negligence in this respect: the rule as to "fellow-servants" does not extend to such a case.

Dillon v. Union Pacific Railroad Co.

3. A servant by voluntarily continuing in the employ of the master with knowledge of the incompetency of the fellow-servant, or of defective machinery and the danger to which this may expose him, waives (unless upon some special ground) the right to recover for injuries thereby caused.
4. These principles applied to the case in judgment—(an action by a locomotive engineer, who sued for an injury which happened in consequence of the want of a signal bell in the cab of his engine which was known to him from the time he entered the defendant's employ)—and it was held on demurrer that the petition did not set forth a case showing that the defendant was liable.

(Before DILLON and DUNDY, JJ.)

Master and Servant.—"Fellow-Servants."—*Duty of Master as Regards Competent Servants and Safe Machinery.*—*Effect of Servant's Knowledge of Master's Failure in this Respect.*

THIS case came before the court on demurrer to the petition. The action is brought to recover for personal injuries to the plaintiff while serving the defendant. It appears from the allegations of the petition, that in August, 1869, the plaintiff was employed by the defendant as a locomotive engineer, to run between Wasatch, Utah, and Bryan, Wyoming, a distance of about 115 miles, and was put in charge of engine No. 63, which was *without a signal bell in the cab*; that plaintiff continued to use the engine in this condition in hauling freight trains until about November 25th, 1869, when by order of his superior officer at Wasatch the plaintiff was directed to haul with said engine a train of passenger cars from Wasatch to Bryan. The engine was still without a signal bell in the cab, but had a bell over the boiler with a rope handle hanging down in front of the window in the cab. By order of the conductor, the rope designed to be attached to the signal bell was connected with the bell over the boiler by tying the two ropes together in the cab, the knot thereby made being immediately in front of one of the panes of glass in the window of the cab. This

Dillon v. Union Pacific Railroad Co.

was done before the train started. When the train had proceeded about twenty-five miles, the bell rope was pulled violently by the conductor whereby the knot uniting the ropes came in contact with a pane of glass in front of where the engineer had to stand, shattering the same. The weather was intensely cold. The plaintiff was thus exposed to the severe weather for about four hours, whereby he was very severely frozen in the lower part of the body.

No allegation is made in the petition that the plaintiff complained of the want of a signal bell, or requested to have one put into the cab, or that he for this reason objected or refused to serve the defendant.

Nor does the plaintiff allege that he notified the conductor of the accident to the pane of glass or made any request for time or materials with which to repair it; but he does allege that he could get nothing with which to close the opening. Nor does he allege that he notified the conductor that he was freezing, but on the other hand, avers, that he "did not know that he was freezing in any part of his body while said trip lasted, and that the first he learned of it was after he had arrived at Bryan."

The injuries are minutely described and the damages placed at \$25,000.

John D. Howe, for the plaintiff.

A. J. Poppleton and E. Wakely, for the defendant.

DILLON, *Circuit Judge*.—In determining this demurrer, it will be assumed without extended discussion that the established doctrine of the law, in the absence of statute regulation, is, that the servant assumes all the ordinary risks of the service upon which he enters, including those risks which arise from the negligence of other servants of the same master in the same employment. The extent of this

Dillon v. Union Pacific Railroad Co.

rule and the scope of its operation we shall notice presently, so far as the allegations of the petition and the argument in support of its sufficiency make it necessary. But the general rule that ordinarily the common master is not liable to one servant for the consequences of the negligence of another servant in the same service, is so thoroughly settled by adjudication, as in our opinion to be no longer open to judicial question. Every court in Great Britain has concurred in the doctrine, including the courts of error; and finally, it was declared sound by the house of lords, upon full debate by eminent counsel, and upon the most deliberate consideration. (*Bartonshill Coal Co. v. Reid*, 3 Macqueen, H. L. 266.)

The current reports show that the rule is unquestioned in that country, and constantly applied without the numerous exceptions which some of the American courts are inclined to engraft upon it.

And in this country the general rule itself is everywhere recognized, the only dispute being as to cases to which it properly applies. The cases will be found cited in Sherman & Redfield's work on Negligence, and in Dr. Wharton's treatise on the same subject. The doctrine is one pertaining to general jurisprudence; it involves no question of *federal* law, and therefore this court is not at liberty, any more than a state court, to disregard the uniform and settled course of judicial decision. The evils which would certainly arise from a holding by the federal courts of a doctrine in conflict with that held by the courts elsewhere upon a question which so frequently arises and of so much practical importance may easily be anticipated.

After a careful consideration of the allegations of the petition as to the negligence of the conductor in violently pulling the rope, etc., etc., we are of opinion that the case made therein falls within the general rule which exempts the master from liability, except it may be in respect to the

Dillon v. Union Pacific Railroad Co.

defect in the engine in not being provided with a signal bell in the cab.

In discussing the questions which arise in this view, we admit that the rule is settled both in Great Britain and America, that the master is bound to use ordinary care to employ and retain competent servants, and to furnish and maintain suitable and safe machinery and structures. We consider that view to be correct, also, which holds that this duty of the master is so far personal and inalienable that responsibility for damages caused by the negligent discharge of it exists, although the master in discharging it may, for his own convenience, act through other servants. (*Garrett v. Webb*, 18 C. B. 797; *Gilman v. Eastern Railroad Co.* 13 Allen, 433, S. C. 10 Allen, 233, and cases cited by Mr. Justice GRAY, p. 238.)

And just here it is that the plaintiff maintains that this rule gives him a cause of action, since his employer failed to use care in providing him with a suitable and safe engine in this, that the engine furnished him was without a usual and proper appliance, namely, a signal bell in the cab, and that it was this omission that caused the injury for which a recovery is sought.

Upon the allegations of the petition it must be taken as true that the engine was defective in this respect, and it may be conceded that it is sufficiently averred that this was the proximate cause of the injury to the plaintiff. We say this may be conceded in disposing of the demurrer, though there is ground to contend that the proximate cause of the injury was not the want of a signal bell or the breaking of the pane of glass, but the plaintiff's failure to notify the conductor thereof, so that it might be closed, or to discover and report his danger. But if it be conceded that the want of the signal bell was the direct cause of the injury, the immediate question is, does the petition, notwithstanding, set out a cause of action, or rather does it contain other averments which, if true, defeat a right of recovery?

Dillon v. Union Pacific Railroad Co.

It will be observed that in the view we are now considering the case the complaint is that there was no signal bell in the cab. The plaintiff was an engineer and the defect of the engine in this respect was known to him, and it appears from the petition that it had been known to him ever since he commenced to use it, the preceding August. He knew, of course, the condition of the engine in this respect before starting out with it on the trip in question. It is not necessary to lay down a rule concerning the effect of knowledge on the part of the servant of the incompetency of a fellow-servant, or of the defective character of the machinery or structures furnished by the employer, broader than the facts of the case require.

The defect in engine was one of the existence and nature of which the engineer had full knowledge; it was peculiarly within his department, and if he voluntarily continued the use of the engine, presumptively he assumed the risk of so doing, and cannot visit it upon the employer. There may be exceptions to this rule as in the case of *Clarke v. Holmes* (7 Hurl. & N. 987, in which the exchequer chamber affirmed the judgment below, 6 Hurl. & N. 349), where the servant injured had complained of the dangerous state of the machinery and the master had promised to remedy the defect; or in cases, perhaps, where the servant injured did not know or have reason to apprehend the danger to which the defect of the machinery or structure exposed him. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 1871; *Jones v. Yeager*, 2 Dillon, 65; *Union Pacific R. R. Co. v. Fort*, 17 Wall. 558.

The allegations of the petition do not bring the case within the principle of the exceptions, and it falls within the general doctrine expressed by POLLOCK, C. B. "that a servant cannot continue to use a machine he knows to be dangerous at the risk of his employer." *Dymer v. Leach*, 26 Law Jur. 221; S. C. 40 Eng. Law and Eq. 491. Strong

Dillon v. Union Pacific Railroad Co.

instances of the application of the same general principle will be found in *Senior v. Ward*, 102 Eng. C. L. (1 El. & El.) 385; *Griffiths v. Gidlon*, 3 Hurl. & Nor. 648; *Assop v. Yates*, 2 *Ib.* 768; *Watling v. Oastler*, Law Rep. 6 Exch. 78; *Holmes v. Clarke*, *supra*; *Patterson v. Wallace*, 28 Eng. L. and Eq. 48; *Buzzell v. Laconia Manufacturing Co.* 48 Maine 118; *Frazier v. Pennsylvania R. R. Co.* 38 Pa. St. 104, 111; *Davis v. Detroit R. R. Co.* 20 Mich. 105, 127, 1870, approving *Mad River, &c. R. R. Co. v. Barber*, 5 Ohio St. 564; *Hayden v. Smithville Manufacturing Co.* 27 Conn. 548; *Laning v. N. Y. Central R. R. Co.* 49 N. Y. 521, 1872.

Assuming it to be true as some of these cases hold (see *Laning v. N. Y. Central R. R. Co.*, *Watling v. Oastler*, *Senior v. Ward*, *Holmes v. Clarke*, above cited), that the servant's knowledge of defective materials and structures or of incompetent fellow servants defeats a recovery by him on the ground of "contributory negligence," and that it is not needful for the pleader to negative contributory negligence in the declaration (*Railroad Co. v. Gladman*, 16 Wall. 402), still if the facts are, as in this case, set forth, fully detailing the manner in which the injury happened, and if they show a state of case which defeats a right of recovery, a demurrer to the petition will lie. Upon the whole our judgment is that the petition does not set forth such a case as shows the defendant to be liable for the injury to the plaintiff. Accordingly judgment will be entered for the defendant on the demurrer.

JUDGMENT ACCORDINGLY.

DUNDY, J. concurs.

NOTE.—Concerning the the liability of masters to servants, see the *Union Pacific Railroad v. Fort*, 17 Wall. 553, affirming S. C. 2 Dillon C. C. 259, and *Union Packet Co. v. McCue*, 17 Wall. 508. The courts of Great Britain and America have concurred in the general doctrine of the non-liability of the employer for an injury to one servant caused by the negligence of another servant in the same common employment. In

Dillon v. Union Pacific Railroad Co.

England this doctrine has been affirmed time and time again by every court in Westminster Hall, and finally by the house of lords. *Bartons-hill Coal Co. v. Reid*, 3 Macqueen App. Cas. 266. The first case was *Priestley v. Fowler*, 3 Mees. & W. 1. In *Holmes v. Clarke* (itself an important case on this subject), 7 Hurl & N. 937, 947, 1862, Mr. Justice BYLES, remarks: "The case of *Priestley v. Fowler* introduced a new chapter into the law, but that case has since been recognized by all the courts, including the court of error and the house of lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land." In a very recent case this rule is said to be "conclusively settled." *Feltham v. England*, Law Rep. 2 Queen's Bench, 38, 1866. In this case MELLOR, J., says that "this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey." In another case it is said: "A foreman is a servant as much as the other servants whose work he superintends." Per WILLES, J., in *Gallagher v. Piper*, 111 Eng. C. L. 669, 1864. Further, as to who are "fellow-servants" within the rule, see Whart. on Neg. sec. 229; *Wigmore v. Jay*, 5 Wellsby, Hurl. & Gord. 354, 1850; *Skipp v. Eastern Counties Railway Co.* 9 *Ib.* 221; *Wiggett v. Fox*, 11 *Ib.* 882; *Bartons-hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Waller v. South, &c. Railway Co.* 2 H. & C. 102; *Gallagher v. Piper*, 111 Eng. C. L. 669; *Morgan v. Vale, &c. Railway Co.* 5 B. & S. 570, 736; *Tunney v. Midland, &c. Railway Co.* Law Rep. 1 C. P. 291; *Lovegrove v. London, &c. Railway Co.* 16 C. B. N. S. 669. See *Murphy v. Smith*, 19 C. B. N. S. 361, as to servant being considered as the master's representative in the establishment. On this last point see, also, remarks of Mr. Justice DAVIS in Fort's case, *supra*, to the effect that Collett, who had been entrusted by the railroad company with the care and management of dangerous machinery, was the representative of the company, which was liable "either upon the maxim of *respondeat superior* or upon the obligations arising out of the contract of service" for Collett's wrongful order to the plaintiff—that order relating to a duty within the scope of Collett's employment and outside the scope of the plaintiff's engagement, and wholly disconnected with it.

In this country the *general rule* is recognized as the law by the courts of, perhaps, every state which has passed on the question, except where it is changed by statute. The only dispute is as to the extent of the rule, or rather as to the cases to which it is justly applicable. We do not recollect any case in the supreme court of the United States either directly sustaining or rejecting the general doctrine. It is noticeable, however, that in the case of the *Northwestern Packet Co. v. McCue*, Mr. Justice DAVIS, delivering the opinion of the court, remarks: "It is insisted on the part of the plaintiff in error, that a master is not respon-

Dillon v. Union Pacific Railroad Co.

sible to a servant for injuries caused by the negligence or misconduct of fellow-servant in the same general business ;" but "*whether this general proposition be true or not*, it is not necessary to determine in the state of record." And in Fort's case the same learned justice observes: "It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition as stated, be true or not, we do not propose to consider, because, if true, it has no application to this case."

This language would lead to the inference that the supreme court may entertain doubts as to the soundness of the rule under discussion. But as the general doctrine is so firmly rooted by judicial decision in Great Britain and in the different state courts of this country, as it is one which pertains to general jurisprudence, and involves no question of federal law, it would seem that it is no more open to re-agitation in a federal court than in any other court of common law powers.

We may mention some exceptions to the rule, or cases which are not considered as falling within its reasons, and to which, therefore, it does not apply. It is settled, both in England and America, that the master is bound to use ordinary care to employ, or to retain in his employment, *none but competent servants*, and to use like care to furnish and maintain suitable and safe machinery and structures. *Bartonshill Coal Co. v. Reid*, *supra*; *Tarrant v. Webb*, 18 C. B. 797; *Weems v. Mathieson*, 4 Macqueen, 215; *Clarke v. Holmes*, *supra*; and see cases next cited. It is also settled by the courts, that this duty of the master is so far personal that responsibility for injuries directly caused by the negligent discharge of it exists, although the master may for his own convenience act through other servants. On this subject see the following very recent cases in addition to those last cited: *Brothers v. Carter*, 52 Mo. 372, 1873, and cases cited by WAGNER, J.; *Gilman v. Eastern Railroad Co.* 10 Allen, 233; 8 C. 13 Allen, 433, and cases cited by GRAY, J.; *Laning v. N. Y. Central R. R. Co.* 49 N. Y. 521, 1872. And the reason is that this duty of the master is direct and personal, and must be discharged in person or by others for him, for whose negligent acts and omissions he is responsible where these are the immediate cause of injury to his servants.

On this point we call attention to the following observations of Mr. Justice DAVIS in Fort's case: "It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employe, in entering the service of the principal, is presumed to take upon himself the risks incident to

Dillon v. Union Pacific Railroad Co.

the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employe in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employes of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

In this connection an important practical question may be adverted to, and that is, as to the effect of knowledge on the part of the servant injured that the master had not discharged his duty in providing competent fellow servants or fit and safe materials or machinery. The following are the more important cases on this point: *Walling v. Oastler*, Law. Rep. 6 Excheq. 73, 1871; *Senior v. Ward*, 1 El. & El. 385 (102 Eng. C. L. 384); *Dynen v. Leach*, 26 L. J. 221; S. C. 40 Eng. L. and Eq. 491; *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648; *Smith v. Dowell*, 3 F. & F. 238; *Laning v. N. Y. Central R. R.* 49 N. Y. 521, 1872 (full discussion); *Frazier v. Penn. R. R. Co.* 38 Penn. St. 104; *Davis v. Detroit, etc. R. R. Co.* 20 Mich. 105, 127, 1870, where the cases are referred to and the subject fully examined by COOLEY, J.; *Hayden v. Manufacturing Co.* 29 Conn. 548, 1861; *Buzzell v. Manufacturing Co.* 48 Maine, 113; *Jones v. Yeager*, 2 Dillon C. C. 65, 68. They authorize the deduction of the general rule that if the plaintiff voluntarily continue in the master's service with full knowledge of the incompetency of the co-servant, or of the unfit and defective machinery, and of the danger thereby occasioned, this will be considered such "contributory negligence" on his part as to defeat his right to recover unless upon some special ground, as in *Holmes v. Clark* (6 Hurl. and N. 349, affirmed, 7 ib. 937), where the servant made complaint, and the master thereupon promised that the grounds of it should be removed. This rule, that knowledge by the servant injured of the danger will disentitle him to recover if he voluntarily remains in the service without complaint, clearly applies to a case where it is the duty of the servant himself to inform the master or superior of the co-servant's unfitness, or the unfitness of the materials or structures. See particularly on this point, *Patterson v. Rail-*

Dillon v. Union Pacific Railroad Co.

road Co. Sup. Ct. Pa. 1874; *Snow v. Railroad Co.* 8 Allen, 441. The reason for this exemption of the master from responsibility, would not seem to apply where the servant injured could not reasonably be held to know the danger to which the master's neglect of duty exposed him. It seems to us that some of the cases have asserted rather too rigid a rule against the servant arising out of his knowledge of the neglect of personal duty of the master as respects co-servants and materials, and his supposed acquiescence in it; and there are aspects of this subject that need to be further discussed and decided before the law can be regarded as settled. See Wharton on Negligence, sec. 214 and cases cited.

What is necessary to constitute relation of master and servant, see Mr. Hilliard's article, 1 Cent. Law Journal 396, citing *Brady v. Giles*, 1 M. & Rob. 494; *Lackawana v. Chenevith*, 52 Pa. St. 382; *Flinn v. Phila.* 1 Hous. 469; *Williamson v. Wadsworth*, 49 Barb. 294; *Wood v. Cobb*, 13 Ala. 58; *Fay v. Davidson*, 13 Minn. 523; *Stone v. Western*, 38 N. Y. 240; *Hall v. Warner*, 60 Barb. 198; *Sykes v. Bates*, 26 Iowa 521; *Chicago v. Volk*, 45 Ill. 175. Wharton on Negligence, chapter V. sec. 202, *et seq.* Shearman & Red. on Neg. secs. 60, 73.

Wilful tort of servant.—While the liability of the master, says Mr. Hilliard (1 Cent. Law Journal, 396) "for the mere negligence of his servant seems perfectly well settled, the cases are not entirely reconcilable with reference to his liability for wilful wrongs of the servant, though done in connection with the master's business. The strong tendency, however, of the more recent decisions is, to hold the master equally responsible for both classes of injury. The question has of late been most frequently raised in actions against railroad companies for acts of force, unjustifiable in kind or excessive in degree, committed by their conductors or other officers from violation of the rules of the company. In *Seymour v. Greenwood*, 30 L. J. Ex. 378; 7 H. & N. 358, WILLIAMS, J., well expresses the principle of liability upon which the most recent cases seem to proceed: 'It is argued that though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibus, generally, and that that authority must include an authority to turn out any passenger who misconducts himself, yet that it gives no authority to turn out an unoffending passenger. But by giving the guard authority to turn out an offending passenger, the defendant necessarily gave him also authority to judge for himself who should be considered an offending passenger.' Acc. *Goff v. Great*, 3 El. & El. 672, where the act complained of was the arrest of the plaintiff for the benefit of the company, there being authority to arrest a passenger for traveling without payment of his fare, and the court held that the station master and the policeman had implied authority to arrest those whom he believed to be guilty, and if there was a mistake, it was a mistake made within the scope of their

 First National Bank v. Douglas County.

authority. But in the late case of *Poultton v. The London, etc.* L. R. 2 Q. B. 534, the important distinction was made that when a railroad company would itself have no right to arrest, a wrongful arrest by one of its employes would not render the company liable, as where the plaintiff was detained in custody by two policemen, under the orders of the station master, for non-payment of the freight of a horse, the company would have a right to detain the horse, but not to arrest the owner, and therefore the action for false imprisonment did not lie." Mr. Hilliard refers to the following cases as showing the course of authority on this subject: *Gilmartin v. New York*, 55 Barb. 239; *Luttrell v. Haden*, 3 Sneed, 20; *Althof v. Wolf*, 2 Hilt. 344; *Seymour v. Greenwood*, 7 Hurl. & N. 356. See Shearman & Redf. on Neg. secs. 65, 67.

"And the general rule," says Mr. Hilliard (1 Cent. Law Journal, 398) "has been laid down that a master is not responsible for the wilful or criminal wrong or trespass of his servant. *Jones v. Hart*, 2 Salk. 440; *Coleman v. Riches*, 16 Com. B. 104; *Hubbersty v. Ward*, 8 Exch. 330. Or that the injury must arise in the execution of some service, lawful in itself, but negligently or unskillfully performed, and not be a wanton violation of law by the servant, though occupied about the master's business. *Moore v. Sanborne*, 2 Mich. 519.

This was the point decided in the leading case of *McManus v. Crickett*, 1 East, 109, where the court of king's bench went into an examination of all the authorities, and after much discussion and great consideration, held that, by committing a wilful wrong, the servant virtually abandoned his master's business, who, therefore, was not liable to the party injured. And text books of authority have favored this view. See 2 Greenl. Evi. secs. 52, 168; 2 Kent, 5th ed. 258; 1 Sharsw. Blackstone, 431."

See *Coleman v. Riches*, 16 Com. B. 103 (leading case) as to liability of master for fraud of his servant. *Grant v. Norway*, 10 Com. B. 665; *Hubbersty v. Ward*, 8 Exch. 330. [REP.]

 FIRST NATIONAL BANK v. DOUGLAS COUNTY.

Under the legislation of Nebraska, shares in national banks may be taxed, and the tax enforced by distraint against the property of the bank.

(Before DILLON, Circuit Judge.)

Taxation of National Bank Shares.

J. M. Woolworth, for the plaintiff.

J. C. Cowin and *J. M. Thurston*, for defendant.

First National Bank v. Douglas County.

DILLON, *Circuit Judge*.—This is a bill by the First National Bank of Omaha to restrain the collection of a tax assessed and levied under the revenue laws of the state, for the year 1873, upon the shares of the shareholders in the bank, and which tax, it is alleged, the collector is about to collect by entering the banking-house of the plaintiff, and seizing its property.

The bill avers that the capital of the plaintiff is \$200,000, and that this amount is wholly invested in bonds, issued by the United States; the stock is divided into shares of \$100 each, and is valued for taxation at that sum. The object of this bill is to have the whole tax declared void, and to restrain its collection.

The principal ground for the relief asked, is, that the act of the legislature of the state, passed February 27th, 1873, which provides for the taxation of shares in national banks, is void, for non-compliance with the conditions upon which, under the acts of congress, such taxation by the state, or under its authority, is permissible.

The third section of this act is in these words: "The stockholders of every *national bank* located in this state, or of any bank incorporated under the laws of the state, shall be assessed and taxed on the *value of their shares of stock* therein, in the precinct where such bank is located, whether the stockholders reside in such place or not. Such shares shall be listed and assessed with regard to the ownership thereof, subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this state, in the county or precinct where such bank is located. The shares of capital stock of national banks not located in this state, held in this state, shall not be required to be listed under the provisions of this act. Each national bank shall furnish to the assessor a full and correct list of the names and residences of its stockholders, and the num-

First National Bank v. Douglas County.

ber of shares held by each, and the assessor shall report the same to the county clerk in his assessment return. The taxes against such shares shall be levied against the holder of the same, in the list of personal property, and shall be *paid by the bank.*"

The revenue law of the state further provides that the value of stock in corporations shall be taxed, and that "in assessing the value of such stock, the actual value, in cash, of all the property that is represented, shall be considered, and no deduction shall be made in such valuation by reason of debts owing by said corporation, unless, as in other cases, such deductions be made from the item of money and credits listed by such corporation."

The plaintiff contends that the act of February 27, 1873, is void, and no tax can be lawfully levied thereunder, because:

1. The act does not provide that the tax imposed on the shares shall not exceed the rate imposed upon the shares of banks organized under the authority of the state.

2. The act in effect provides for the taxation of the *capital* of the national bank, and not of the *shares* in the hands of the stockholders thereof, forasmuch as, thereunder, the valuation of the entire property of the bank is to be first ascertained, and the bank itself is to pay the taxes—the name of the stockholder being used merely to give to the proceedings the color of a tax upon the shareholder's interest.

The act of congress, in express terms, allows the states to impose taxes upon the shares of national banks, and the only substantial limitation upon the power of the states is that they shall not subject these shares to taxation to an amount greater than they assess upon their own banks, or upon moneyed capital in the hands of their own citizens.

The first objection above stated to the state enactment is not well taken. The act provides in terms that the stockholders in all banks, state and national, shall be assessed and taxed on *the value of their shares therein*. This is equiva-

First National Bank v. Douglas County.

lent to a provision that there shall be no discrimination in favor of the state banks, and against the national banks and it is not necessary that there should be added a clause that the tax imposed on the shares in national banks shall not exceed that imposed on shares in state banks.

It is next urged as an objection to the state legislation above mentioned, that it in effect provides for a tax upon the *capital* instead of the *shares* of the banks, and that as the capital of the plaintiff is invested in United States securities, which are exempt from taxation, the taxation under the law of the state is illegal. By recurring to the act of the state, it will be seen that it does not undertake to tax capital, but only shares, and that this mode is prescribed for shares in both classes of banks. It is settled by the decisions of the supreme court of the United States that, as respects the power to tax, there is a distinction between capital and shares; and that the shares may be taxed, although the entire capital of the bank is invested in United States bonds, and that in the valuation of such shares for taxation, such valuation is not illegal because the assessing officers have not deducted the value conferred upon the shares by the non-taxable United States securities owned by the bank. *Van Allen v. Assessors*, 3 Wall. 573; *People ex rel. Duer v. Tax Commrs.* 6 Am. Law Reg. 467; *Lionberger v. Rouse*, 9 Wall. 470.

The above cases are decisive against the objection we are now considering to the act of the state. It does not attempt to discriminate against the national banks, but provides one and the same mode for ascertaining the value of shares in the stock of all corporations, and more than this, the legislation of congress does not require. *Lionberger v. Rouse*, *supra*.

The bill does not state that the valuation of the shares in the plaintiff's bank is in excess of their actual value, nor that the valuation of the shares in the State Bank of Nebraska is less than their real value, and states no fact show-

Sullivan v. Union Pacific Railroad Co.

ing that the taxation, which the plaintiff seeks to avoid, is in fact excessive or disproportionate. It is therefore destitute of any substantial equity.

It is alleged on information and belief, that the capital of the banking partnership of Caldwell, Hamilton, & Co. has not been assessed for taxation, but it is not stated that this has been intentionally done, nor does the bill negative that this may have been an accidental omission, and hence makes no case entitling the plaintiff to relief against the payment of the taxes in question.

It is, however, insisted that the *bank* can not be made liable in respect of the taxes on the shares, and that the collector ought to be restrained from making distress of the property of the bank. But the act of the state in terms provides that the taxes on the shares "shall be paid by the bank," and it is competent to make such a provision. *National Bank v. Commonwealth*, 9 Wall. 354; *Lionberger v. Rouse*, *supra*. Undoubtedly the bank could be made liable to pay such taxes by suit, and no reason is seen why the collection may not be enforced by distraint in the same manner as other taxes are collected. The demurrer to the bill is sustained and the bill dismissed.

DECREE ACCORDINGLY.

NOTE.—Taxation of capital stock in National banks. See *Bank of Omaha v. Douglas Co. ante*, p. 298.

DANIEL SULLIVAN v. UNION PACIFIC RAILROAD COMPANY.

1. Where a servant is killed on the spot, by the wrongful act of the defendant, the master may recover for the loss of service. Where the death does not immediately ensue, but afterwards takes place, the master is not limited in the estimate of his damages to the period of the servant's death.

Sullivan v. Union Pacific Railroad Co.

2. Such a case distinguished from one for an injury to the servant himself. Without a statute, an action for such injury does not survive the death of the person injured, and cannot be brought by his representatives or next of kin.
3. The English and American cases, as to the remedy of a father for the loss of the services of his infant child, whose death has been caused by the wrongful act of another, commented on.

(Before DILLON and DUNDY, JJ.)

Negligence.—Right to Recover Damages where Death is Instantaneous.—Master and Servant.

DEMURRER to petition. The petition represents that the plaintiff is father of one James Sullivan, who was an employe of the defendant at \$2.00 per day, which was received by the plaintiff; that his said son was 17 years of age; that, while in the service of the defendant, he was, by its negligence, "caught between the cars of the defendant and was fatally bruised and wounded, from which he died within six hours." The facts, intended to show that the death of the son was caused by the fault of the defendant, are fully stated in the petition, but it is not necessary to refer to them at length. The plaintiff claims as damages, the value of his son's services from the date of his death until he would have become of age, and also \$20 for medical services, \$10 for nursing, and \$250 for burial expenses, amounting, as alleged, to the sum of \$3,412 for which judgment is asked.

Demurrer on the ground that the petition shows no cause of action.

Redick & Ferguson, for the plaintiff.

A. J. Poppleton & E. Wakely, for the defendant.

DILLON, *Circuit Judge*.—The plaintiff sues in virtue of his relationship of father, for the loss of the services of his

Sullivan v. Union Pacific Railroad Co.

minor son, and for special damages, which were occasioned by his alleged wrongful death through the negligence of the defendant. There is no statute in Nebraska giving such an action, and counsel concede that, at the time the present cause of action arose, there was no statute in the state like Lord Campbell's act, 9 and 10 Vict. c. 93. This action must be maintained, therefore, if at all, on general or common law principles. In commencing our inquiries, let us ascertain the exact character of the action. When a minor child is injured by the tort of another, pecuniary damages result to his father as master entitled to his services, as well as to the child itself. Hence two distinct actions may be brought. One by the parent or master for the loss of services, and another by the child, by its next friend or guardian, for the injury to itself. These are familiar and undisputed principles. But in the latter case, if the child should die in consequence of the injury, the cause of action did not, by the common law, survive, and by that law, no right of recovery, for the damages resulting from the death, existed in favor of his personal representatives or next of kin. It was to remedy this defect in the law, that is, to give an action to the personal representatives, where death ensued from the wrongful act of another, that Lord Campbell's statute was passed. This is manifest both from its recital and its provisions. It did not provide for the case of masters, and their rights are not touched by it.

Is it, then, a principle of the common law, that where the death of the servant immediately ensues from the wrongful act of another, there is no remedy for the master, and that where it ensues therefrom afterwards, the master's loss cannot be estimated beyond the period when the death occurred? Such a principle cannot be vindicated on considerations of reason, justice or policy, and I could only consent to recognize it upon being satisfied that it was one of the rules of the common law, so long and so well settled, that

Sullivan v. Union Pacific Railroad Co.

the courts are bound to accept and apply it until it is changed by legislative action.

If the child of the plaintiff had, by the wrongful act or neglect of the defendant, been disabled from work, but not killed, it is clear that the plaintiff would have his action for the loss of service. *Fort v. Union Pacific Railroad Co.* 17 Wall. 553. So if the child thus injured was disabled from work thereby, and remained disabled for a year and then died, it is also clear, and has been several times decided, that the father or master could recover for the loss of his services down to the date of the death. *Hyatt v. Adams*, 16 Mich. 180; *Baker v. Bolton*, 1 Camp. 493.

The negative of this proposition has never been judicially asserted. But if the injury, caused by the tort of defendant is so great that death ensues immediately, does the law deny the master or parent all remedy, when, if the injury had been less, there would be, as we have just seen, a remedy, at least to some extent? And when death ensues, whether sooner or later, does that limit the time down to which the loss must be estimated? The consequences of the injury where death happens, affect the father until the child would become of age, and to give damages only until the death, is to recognize the right of the father to compensation for the injury to him, but to stop part way in measuring the compensation.

It is evident, that since the father is entitled in law to the services of his child until majority, and since the wrongful act which causes the death of the child deprives him of such services, we have here the damage and pecuniary injury which, on general principles, give a right to compensation. If such right does not exist, it is on the wrong-doer to show why. No attempt is made, and the attempt cannot be successfully made, to show that, justly, the father in such case should have no compensation, or only a partial compensation, down to the date of the death. Accordingly, the civil

Sullivan v. Union Pacific Railroad Co.

law, and the French and Scotch law, recognize the right to maintain actions like the one at the bar.

To defeat the right of action, reliance is placed by the defendant solely upon the proposition, that the common law doctrine, as Lord Ellenborough is reported to have expressed it, in the case hereafter adverted to, is, that "in a civil court, the death of a human being cannot be complained of as an injury." *Baker v. Bolton*, 1 Camp. 493, 1808. It may be observed, that strictly the complaint of the plaintiff is not for the death of his son, but for the wrongful act, which, by producing the death, was the cause of his pecuniary damage. This is, perhaps, what Lord Ellenborough means, and I now proceed to inquire whether this is a doctrine of the common law, established so early and so firmly as to be binding upon the American courts, and to be changed only by the legislature.

This makes it necessary to refer to the English decisions. This I shall do with all possible brevity, and shall then notice the leading American cases upon the subject. Whoever examines the cases critically, will, I think, come to the conclusion that an American court, in a state where the question is untouched, is at liberty to adopt a rule which is consonant with its sense of justice, and is not bound to regard the doctrine contended for by the defendant as binding upon it. The earliest case upon the subject is *Higgins v. Butcher*, Yelv. 89. The plaintiff's wife died of an assault and battery upon her by defendant, and plaintiff brought an action for the damages. The views of the court are thus expressed by TANFIELD, J.: "If a man beat the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master before, and his action is *thereby* lost." Obviously, the denial of the master's right is here

Sullivan v. Union Pacific Railroad Co.

placed upon the ground that the death of the servant having been feloniously caused, the private injury is merged in the public offense. This would not apply to any case in which the act producing the death, though negligent, was not criminal, and at this day would not be a ground on which to defeat a private remedy otherwise existing.

But the leading case to establish the doctrine maintained by the defendant is the *nisi prius* case of *Baker v. Bolton*, before mentioned, decided by Lord Ellenborough, in 1808. The plaintiff and his wife were upset while travelling on a stage coach of the defendants, and both were injured, and the wife died in about a month. The plaintiff, *inter alia*, sought to recover damages in respect of the loss of his wife's services, and Lord Ellenborough directed the jury that "the damages, as to the plaintiff's wife, must stop with the period of her existence," and the reason given was that "in a civil court, the death of a human being cannot be complained of as an injury." He cites no cases and enters into no discussion, and does not profess to rest upon precedent. The case was determined in 1808, and if it is the *origin* of the doctrine contended for by the defendant, it was decided at so late a period as not to be binding upon the courts of this country as part of the common law. I admit that it does hold the doctrine that the date of the death of the servant limits the period to which the loss of the master must be estimated.

The direct question did not again arise in England until as late as 1873, when *Osborn v. Gillett*, Law Rep. 8 Exch. 88, came before three of the judges of the court of exchequer. Two of the barons against one dissenting, there held that a master cannot maintain an action for a tortious act which caused the *immediate* death of the servant, and this holding, as far as it was placed upon precedent, was rested upon *Baker v. Bolton*. The opinions cover the whole ground, and it seems to me that the better reasons were with the

Sullivan v. Union Pacific Railroad Co.

dissenting baron. The majority felt bound by *Baker v. Bolton*, but, as above suggested, it has no such authoritative force in this country. Whether the case was carried up on error does not appear. If it were, the judgment might well be affirmed, and yet an American court would be at liberty to decline to accept and apply its doctrine. It is noticeable that no attempt was made by the majority to vindicate the doctrine they felt bound to follow.

The earliest and leading American cases are *Carey v. Berkshire R. R. Co.* and *Skinner v. Housatonic R. R. Co.* 1 Cush. 475, 1848. One of these actions was by the plaintiff as widow, for the loss of the life of her husband, and the other by a father for the loss of service of his infant son, whose death was caused by the negligence of the company. Is it not a little remarkable that the court treats the cases as involving the same principle, although the wife has no legal right to the services of her husband, nor common law right to recover for his death? And following *Baker v. Bolton*, the court decided that in neither of the cases could the action be maintained.

Another case is *Eden v. Lexington, etc. R. R. Co.* 14 B. Mon. 204, 1852, in which the husband sued for loss of services of wife, who was instantaneously killed by the alleged tortious act of the defendant. The case seems justly open to the criticism of BRAMWELL, B. in *Osborn v. Gillett*, *supra*. Liability was denied except for damages down to the time of the death on the strength of *Baker v. Bolton*, and the common law rule asserted in that case is supposed, by the judge delivering the opinion, to rest on the untenable ground that the public wrong merges the private injury.

In a similar action the supreme court of Michigan held that the husband could recover damages down to the death of the wife, but not beyond that event. This ruling was in accordance with what the court regarded as the common law rule, declared in *Baker v. Bolton*, and is quite at a loss to discover its reason or philosophy.

Sullivan v. Union Pacific Railroad Co.

On the other hand, in *Ford v. Monroe*, 20 Wend. 210, where the plaintiff's son was killed, there was a recovery for loss of services down to the period when he would have become of age, but the right to recover to this extent seems to have been assumed without question. The question was not decided in *Pack v. New York*, 3 Comst. 489, 493; and was expressly reserved by the court of appeals in *Whitford v. Panama R. R. Co.* 23 N. Y. 465, 1861. But in *Green v. Hudson River R. R. Co.* 2 Keyes, 294, 1866, the court of appeals followed the doctrine of *Baker v. Bolton*. See *Plummer v. Webb*, Ware. 80.

The authentic evidence of what the common law is, must be found in the judicial reports. It will be seen that all the cases, English and American, on this subject, rest upon the *nisi prius* decision, in 1808, of Lord Ellenborough in *Baker v. Bolton*. Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is that it ought not to be followed in a state where the subject is entirely open for settlement. It would be different if the rule had been settled in England by a long course of decisions, made prior to the settlement of this country, as in that event the courts here would find it more difficult to reject it.

In view of the tenor of the cases, some of which, however, are not well considered, and all of which rest upon *Baker v. Bolton*, it requires some courage to disregard them; but as the rule they assert is incapable of vindication, and cannot be shown to be deeply rooted in the common law, my judgment is, that I am free to decide the rights of the parties without applying it.

With an amendment, in one respect, the petition sufficiently sets forth that the death of the son was caused by the negligence of the defendant, its servants and agents.

DEMURRER OVERRULED.

Sullivan v. Union Pacific Railroad Co.

NOTE.—The foregoing case was, at the instance of the circuit judge, certified by the judges to the supreme court, where it is still pending. Whether the view above taken will be adopted by the supreme court, admits of course of doubt, but the subject is of sufficient interest to justify the insertion of the opinion, whatever may be the result in the appellate tribunal. The above case has, at least, served to call the attention of the profession to the subject which has recently been much discussed in the law periodicals (1 Cent. Law Jour. 597; 2 *Ib.* 117, 128; West. Jurist, for January, 1875).

The main, if not the only objection which has been made to the doctrine, is that it disregards a *settled rule* of the English common law.

If the question is not concluded by previous adjudications, it seems to be admitted on all hands that the view taken in the opinion in Sullivan's case, is, on principle and reason, correct. Let us see how the question stands. The civil law, and the French and Scotch law, founded upon it, give the right to such an action, notwithstanding the death.

So in the courts of admiralty, which are not bound by the common law adjudications, whatever they may be on the point under consideration, and are free to decide according to natural justice, concur in holding that actions like the present are maintainable. *Cutting v. Seabury*, 1 Sprague, 522. But it is contended that if the wrongful act is so great as to take life at once, then the master has no right and no remedy against the wrong-doer. Certainly, those who contend that there is any such anomalous and unreasonable exception to the general principles of the law, ought to make out a clear case showing it. *The cases, English and American, all rest upon the nisi prius* decision of Lord Ellenborough on *Baker v. Bolton*, the facts of which are confessed to be "loosely stated" (L. R. 8 Exch. 100, per KELLY, C. B.), and in which his lordship gives no reasons and cites no authorities for the proposition which he advances—a proposition, which, as shown above, had no application to Sullivan's case. No prior case to that effect can be found in the English books, unless *Higgins v. Butcher*, Yelv. 89, be so regarded, and if so, it proceeded on the now exploded doctrine that the felony drowned the private action. (*White v. Spettigue*, 13 M. & W. 603; *Wells v. Abrahams*, Law Rep. 2 C. P. 615; *Osborn v. Gillett*, Law Rep. 8 Exch. 88.) So that it remains true that the English law reports contain no prior case supporting the doctrine of *Baker v. Bolton*. It is also true that no prior case can be found in the English books laying down a contrary doctrine. Is the conclusion a just one, because no previous cases can be found, that Lord ELLENBOROUGH must be assumed to have declared a correct and well-known principle of the common law? If any such principle of law was well known and established, the law reports or treatises of eminent lawyers would contain evidence of it. But there is no case declaring the broad

 Union Pacific Railroad Co. v. Durant.

principle asserted by Lord ELLENBOROUGH, nor is it asserted in the elementary works. On the contrary, Mr. Smith, in his excellent work, assumes the contrary. (Master and Servant, 3d ed. 139.)

The American cases generally follow *Baker v. Bolton*. But there are decisions the other way. (*Shields v. Yonge*, 15 Ga. 349; *James v. Christy*, 18 Mo. 162; *Ford v. Monroe*, 20 Wend. 210; *Plummer v. Webb*, Ware, 80.) It is, however, conceded that the current of American decisions is otherwise, but they all rest upon the authority of *Baker v. Bolton*, or the principle which is there declared. By those who conceive it to be the duty of a court to decide according to the greater number of adjudicated cases, the conclusion in Sullivan's case will be regarded as erroneous. But by those who consider the law to be a science founded upon reason, and by those who, while they reverence precedents, will not slavishly follow them, it may, perhaps, be concluded that the court was right in refusing to carry into a new region an anomalous and indefensible principle of law, resting on so slight and questionable a foundation as *Baker v. Bolton*, without any prior, authentic evidence or memorial of its existence. [REP.]

 UNION PACIFIC RAILROAD COMPANY v. THOMAS C. DURANT.

The acting president and active manager of a railroad company, by an oppressive exercise of his powers, procured donations of property to be made to him in trust for the railroad company: Held, that his action was illegal, and that it affected the company, and that the effect was that he held the property in trust for the donors, and not the company.

(Before DILLON, Circuit Judge.)

Donation of Property to Secure Location of Railroad.

IN equity — on final hearing. The case made by complainant, in its bill, is substantially this: That in the month of November, 1863, the Union Pacific Railroad Company, having been incorporated and organized, and being about to commence the construction of its road, and having already commenced surveys in Nebraska, at or in the vicinity of Omaha, for the purpose of ascertaining the best

Union Pacific Railroad Co. v. Durant.

point for the location of its eastern terminus, and the most practicable route thence westward, certain citizens of Omaha proposed to Peter A. Dey, the engineer in charge of said surveys, to convey to T. C. Durant, at the date of such proposal the president and acting manager of the corporation, for its use, certain tracts of land and certain lots therein described, "said conveyance to be made conditional upon the location of the said eastern terminus within one and a quarter miles of Farnam street, thence running west from said point towards the Platte valley;" that such proposal was accepted, and the conditions performed, and that, after the performance thereof, the several parties being satisfied therewith, and being willing to convey according to their agreement, offered to make such conveyances, and such conveyances were accordingly made; but, by the express direction of Durant, his name was inserted therein as grantee and "trustee," and the said conveyances recited the receipt of the consideration thereof in full, as being "in consideration of the location of the eastern terminus of the Union Pacific Railroad at Omaha, within one and a quarter miles of Farnam street, thence running west from said point to the Platte valley;" that it was the intention of the donors to convey in trust, and that Durant took said lands and lots in trust for the corporation, it having furnished the consideration therefor, and still so holds the same, but has refused, upon request, to convey to the rightful owner.

The theory of the bill is, that the lands and lots thus conveyed to Durant as "trustee," were so conveyed in trust for the complainant, and the prayer of the bill is that Durant be compelled to execute the trust and convey the property to the Union Pacific Railroad Company.

The conveyances run to "Thomas C. Durant, trustee," but for whom or what he is thus trustee is not stated in the instruments, and the lands and lots do not, in most instances, adjoin the company's road, and are not necessary for its use and operation.

Union Pacific Railroad Co. v. Durant.

The substance of the answer is, that the corporation did not make the surveys for, or fix the location of, the eastern terminus or westward route of the road, but that the surveys were made at Durant's individual expense, and under his individual management and direction; that the proposed donation was intended to be made to him individually, in order to secure his influence with the president and with the corporation in establishing the terminus and route westward; that, while it is true that the word "trustee" was inserted in said deeds solely at his own instance, it was so inserted to declare a trust in favor of the grantors, in case of non-performance of the conditions of the agreement; that a portion of the lands so conveyed to him he has conveyed to the corporation, because they were necessary to its use, but that the residue he still holds; that the sole consideration of said conveyances was the location of the eastern terminus within one and a quarter miles of Farnam street, and the approval of the route westward by the president, in whom alone was vested the power to fix the terminus or locate the route; that the condition of the contract was never complied with, and that therefore there has been a reversion to the grantors, for whom he holds, and who should be made parties to the suit, but are not.

The lots and tracts of land in controversy are numerous and of great value.

A. J. Poppleton and E. Wakely, for the complainant.

J. M. Woolworth, for the defendant.

DILLON, *Circuit Judge*.—The cause is before the court on final hearing, I do not purpose to refer to the voluminous proofs in detail, but to give the conclusion reached, and, briefly, the grounds of it. The conveyances were made to the defendant as "trustee." As the instruments were drawn in this form at the defendant's suggestion, and as no mis-

Union Pacific Railroad Co. v. Durant.

take or accident in framing them is claimed, it is plain that he does not hold the property for himself in his own right. The deeds estop him to set up such a claim, and the proofs, *aliunde*, show that no consideration for the conveyances moved from or were furnished by him individually.

An attempt was made in the proofs to show that the property was demanded and received by him to reimburse him for the expenses of surveys prior to the completed organization of the company, but this attempt failed. It clearly appears that these expenses were made good to the defendant by the company. It is indisputable, then, that the defendant holds the property *in trust*, and the only question now to be decided is whether he holds it for the complainant by such a trust that it can enforce. As between himself and the railroad company, of which at the date of the transactions in question the defendant was the acting president and active manager, there is no doubt, upon the proofs, that this property was taken by him in trust for it.

The exact point upon which the cause hinges, is whether the company's right to this property is such that a court of equity will, at its instance, enforce the trust by decreeing the defendant to convey the property to it. The history of the transaction shows that the property was unfairly obtained by the defendant acting for the company — obtained under circumstances which a court of equity cannot sanction. The subscription paper is dated November 23d, 1863, and in it the subscribers "agree to convey to T. C. Durant the lots and lands severally described over their respective signatures, for the purpose of securing the location of the eastern terminus of the Pacific road at Omaha City; said conveyances are to be made conditional upon the location of said terminus within one and one-quarter miles of Farnam street; thence running west from said point toward the Platte valley, and to provide that in case of the failure of such location said lots and lands are to revert to and become re-invested in the several grantors."

Union Pacific Railroad Co. v. Durant.

The act of July 1, 1862 (sec. 14), authorized the president to fix the terminus, and the same had been fixed by him on the 17th day of November, 1863, and his action was fully known when the subscription paper of the 23d day of that month was drawn and circulated. After this paper had been subscribed, another executive order, on March, 7, 1864, was made, fixing the eastern terminus on the western boundary of the state of Iowa, opposite section ten of the township in which Omaha is situate. From Farnam street to the nearest part of section ten is a mile and *three-quarters*. The subscribers to the agreement stipulated for a location of the eastern terminus within one mile and a *quarter* of that street. When all of the deeds were made to the defendant as trustee, the legal terminus as thus fixed was known to everybody, but the business terminus, that is the actual terminus, had been fixed by the company within about a half mile of Farnam street. The deeds to the defendant as trustee, none of which are dated earlier than December, 1864, recite that they are made "in consideration of the location of the eastern terminus of the Union Pacific railroad company at Omaha, within one and a quarter miles of Farnam street, thence running west from said point to the Platte valley," and contain no clause as to reverter. It thus appears, with reasonable certainty, that all parties had in view the securing of the actual or business terminus, and not merely the legal terminus. The other matter to be secured, was that the road should run westwardly from Omaha, that is, not to a rival place—Florence on the north, or Bellevue on the south, so as to leave "Omaha on a switch," as one of the witnesses phrases it, and although the route of the road was somewhat changed, it was not changed in the interest of either of those places, or to the detriment of Omaha.

Assuming, though not deciding, that the company has the capacity *in law* to acquire and take property like that in

Union Pacific Railroad Co. v. Durant.

question, not on the line of its road nor shown to be necessary for its operations, I should be of the opinion, that if the subscriptions under the contract of November 23d, 1863, were fairly obtained for a lawful purpose, the defendant would be bound to convey the property to the company. And in this view the whole case lies within the inquiry, was the property fairly or lawfully obtained? In my judgment it was not. There is no satisfactory evidence that this property was demanded by the company, or by Mr. Durant, acting for it, to reimburse it for the additional expense which a terminus at Omaha, instead of at Bellevue or Florence, would involve. Besides, after March 7, 1864, it was impossible for the company, if acting in good faith, not to construct and operate its road to Omaha, and it was after this date that all of the deeds to the defendant were made. Whether an agreement to donate lands in consideration of the location of the depot or business terminus of a railroad can be supported by law, we need not enquire. (See *Fuller v. Dame*, 18 Pick. 472; *Pacific Railroad Company v. Seely*, 45 Mo. 212.) I am not prepared to say, that if a company has by law a discretion to adopt its own line and to go to any point its interest might suggest, and it is induced by offers of pecuniary advantages to adopt a more expensive line to another terminus, that such a transaction would necessarily be against public policy, or fall within the principles of the cases above cited. The facts of this cause present no such question, and I do not enter upon its consideration or give any opinion concerning it.

How these subscriptions were obtained, appears from the testimony; and they seem to have been extorted from the subscribers by reason of the powers which the law had conferred upon the company to be exercised for the public good, and not oppressively. The origin of the demand upon the people of Omaha clearly appears from the testimony of Mr. Dey, the confidential employe of Mr. Durant,

Union Pacific Railroad Co. v. Durant.

and subsequently of the company, and who is a gentleman of high character. He testified that "the demand for these lands came from Mr. Durant." Mr. Dey thereupon caused Mr. Durant's demand to be communicated to leading citizens of Omaha. He says: "I did not circulate the paper [of November 23], but was in constant communication with those who did circulate it, and made many suggestions to them, with the view to aid them in getting the subscriptions filled out." He is asked "for what purpose the lots and lands was to be applied," etc., and his answer is: "The demand for those lands came from me, and the purpose avowed was to influence parties who might be of service to the road and of service in making Omaha the terminal point. Durant said he must have the deeds made to himself as trustee, that he might dispose of the lands without being answerable to any party, and that I stated to Mr. Aug. Kountz (an active citizen in circulating the papers of November 23, 1863) and other parties who were instrumental in procuring the donations." Again Mr. Dey testifies, "I wish to be understood as saying that one of the reasons avowed (why the citizens must give property) was that their donation could be used for that purpose," i. e., "to influence parties who might be of service in making Omaha the terminal point. I avowed that the parties controlling this matter [to-wit, Mr. Durant] had the power to procure such donations of lands as they wanted at the terminus of the road, and they expected to use it, and that I conceived it to be the policy of Omaha to donate what was asked of them. Mr. Durant at that time controlled the whole matter." Mr. Durant was absent and Mr. Dey was his representative. Public meetings were held, and the citizens given to understand that they must donate lots and lands liberally, or else Bellevue or Florence might secure the prize of the terminus; and when the subscriptions were made it is evident that it was

McGinnity v. White.

done out of fear that Mr. Durant would, or might, otherwise use his power against Omaha, and that these donations (which one subscriber considered a species of "black mail," another as a "corruption fund") would have the effect to conciliate his favor and secure his influence.

If Mr. Durant intended to use this property to corrupt the official action of others, it was obtained for an unlawful purpose. If he demanded the property not for this purpose, but because he had the power and intended to exercise it, his action is oppressive and cannot be permitted to stand. And as the company in this suit seeks the fruits of Mr. Durant's acts, they are affected through him with the vice of Mr. Durant's conduct.

My judgment is that the subscriptions to the paper of November 23, 1863, pursuant to which the conveyances were subsequently executed to the defendant, as trustee, were secured by an illegal and oppressive exercise and use of the powers which belonged to the defendant's position as the acting president, and active, and at that time almost the sole, manager of the company, and consequently a court of equity will hold the defendant as trustee for the donors, although he may have intended to take the lands and lots as trustee for the company. Accordingly, a decree will be entered dismissing the bill, except as to the tracts conveyed to him by Enos Lowe, and which he admits in his answer to be held by him in trust for the complainant.

DECREE AFFIRMED.

JOHN MCGINNITY v. FRANCIS A. WHITE, *et al.*

1. Under the act of July, 27th, 1866 (14 Stats. at Large, 306), as to the removal of suits from a state court into the federal court, it is sufficient, *it seems*, as respects citizenship, that the defendant applying for the removal is, at the time of filing his petition therefor, a citizen of an-

McGinnity v. White.

other state, and the plaintiff a citizen of the state in which the suit is brought.

2. It is sufficient in such a case that the matter in dispute exceeds \$500 besides costs *at the time* when the right to the removal accrues and is applied for.
3. One of several defendants sued as *co-partners* may, if the other requisites exist, have the cause removed into the federal court so far as concerns himself.

(Before DILLON and DUNDY, JJ.)

Removal of Causes from State to Federal Court.—Act of July 27th, 1866.—Citizenship.—Amount.—Removal by Part of the Defendants.

ON MOTION by the plaintiff to remand the cause to the state court because it was improperly removed to this court. The removal was ordered by the state court upon the petition of Francis A. White, one of the defendants.

The record shows that the plaintiff commenced his suit in the state court, February 28th, 1870, demanding, in his petition, of the defendants, five in number, as co-partners, \$1,000 for work and labor. A summons claiming that amount was served. The defendants separately demurred for misjoinder of causes of action and parties defendant. On the 1st day of April, 1870, the demurrers were sustained and leave given to the plaintiff to amend the petition in forty days. On May 12th, 1870, an amended petition was filed against the same persons as co-partners, and claiming of them the "sum of \$445, with interest thereon at ten per cent per annum from January 21st, 1870, * * * for work and labor before that date performed by the plaintiff for the said defendants, co-partners in business as aforesaid." The original petition referred to certain written contracts, but the amended petition does not.

On July 22d, 1870, Francis A. White answered separately, traversing the petition, and especially denying that he

McGinnity v. White.

was a co-partner with the other defendants, as alleged therein. One of the other defendants, G. Frederick White, answered separately to the same effect. The cause was continued, and at the December term, 1870, at the instance of the two defendants last named, the venue was changed to another state court, and in that court the cause was continued from time to time by stipulation until the 11th day of April, 1873, when the defendant, Francis A. White, filed his petition for its removal to the circuit court of the United States for the district of Nebraska, and offering surety, etc.

The petition was under the act of July 27th, 1866, and states, *inter alia*, that "the petitioner, Francis A. White, is now, and since the 19th day of February, 1873, has been a citizen of the state of New Jersey; that the plaintiff is, and was at the time of bringing the suit, a citizen of Nebraska: that the amount in dispute exceeds \$500, exclusive of costs; that all the defendants, except David Everest, are citizens of some other state than the state of Nebraska (naming the states); that there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendants as parties," etc. The petition offers surety, etc., and prays the removal of the suit to this court. The surety was accepted and an order made transferring the cause as prayed.

And now in this court the plaintiff moves to remand the same on two grounds:

1. The amount involved does not exceed \$500.
2. One of several alleged co-partners made defendants is not entitled to remove the cause, where some of his co-defendants are citizens of the state in which the suit is brought.

Stephenson & Hayward, for the plaintiff.

T. M. Marquette, for petitioner for removal.

McGinnity v. White.

DILLON, *Circuit Judge*.—I. The petition for removal was under the act of July 27th, 1866 (14 Stats. at Large, 306). This enactment copies, in many respects, section 12 of the judiciary act as to the removal of causes into the federal courts, but it makes two important changes in that section; first, in authorizing, in certain cases, the removal by part of several defendants if some are citizens of the state where suit is brought, and others are aliens or citizens of some other state; second, in *extending the time* in which the application for the removal may be made, down to the trial or final hearing. But as respects the amount in controversy, the language of the judiciary act is retained—"the matter in dispute must exceed the sum of \$500, exclusive of costs."

In cases like the present the amount in controversy, for the purpose of the removal, is determined by the declaration or petition. In this case a demurrer to the original petition having been sustained, the plaintiff made his case by an amended petition filed May 12th, 1870, in which he claimed to recover \$445 with ten per cent interest from January 21st, 1870. This is the only pleading on the record which defendants were bound to answer, and is the one upon which the defendant who subsequently applied to remove the cause, took issue. At the time when this amended petition was filed, and at the time when the petitioner for the removal of the cause took issue upon it, the sum demanded, including interest, did not amount to \$500. But by continuances the cause remained pending in the state court until the 14th day of April, 1873. Meanwhile, to wit, on the 19th day of February, 1873, the defendant, Francis A. White, who was served in Nebraska when the suit was originally commenced, became a citizen of New Jersey. At the next term of the state court thereafter, he applied for the removal of the suit, and by this time, if interest on the sum demanded in the amended petition be included, the amount was more than \$500.

McGinnity v. White.

Under these circumstances the question is, whether "the matter in dispute exceeded \$500," within the meaning of act of July 27, 1866. Under the amendatory act of March 2, 1867 (14 Stats. at Large, 558), Mr. Justice MILLER has determined that a party to a suit who while it is pending becomes a *bona fide* citizen of another state is entitled, if the other required conditions are met, to have the case removed. *Johnson v. Monell*, 1 Woolworth, C. C. 370. As both acts give the right to apply for the removal "at any time before the trial or final hearing of the cause," I can see no difference in this respect between the act of 1866 and the act of 1867, and the reasoning in the case cited seems to be applicable here, and to favor the right of removal. Pending the suit in the state court, the defendant has in good faith become a non-resident of the state of Nebraska and a citizen of another state, and it is this which constitutes the substantial ground upon which the right, under the act of 1866, to the removal is based. If, then, the right to removal accrues upon the party becoming *bona fide* a non-resident citizen, is it not enough that the total amount then claimed against him by his adversary exceeds the sum of \$500? The action being *ex-contractu*, the right to interest follows upon establishing the right to the principal sum, and may properly be included in determining the amount of the matter in dispute. I confess to doubts respecting the soundness of the foregoing view, but have adopted it because it seems to be equally consistent with the language of the act and more consistent with the reason and purpose of it than the opposite conclusion, denying the right to the removal on the ground that the amount was insufficient, when, if judgment should then be rendered by the state court, it would be for a sum greater than that which the act adopts as giving the defendant the right to the transfer.

II. This result makes it necessary to consider the other objection made by the plaintiff to the jurisdiction of this

McGinnity v. White.

court, which is that the suit in its nature is not "one in which there can be a final determination of the controversy," so far as concerns the party applying for the removal, "without the presence of the other defendants as parties to the cause."

The five defendants are sued *as co-partners*, for work and labor, and the separate answer of the defendant now before us puts in issue two cardinal propositions in the petition:

- 1st. That he was a partner with his co-defendants; and
- 2nd. That the plaintiff is entitled to recover of him the amount claimed.

Under the legislation of congress and of the state of Nebraska, the plaintiff could have maintained an action against one or more of the defendants, and it would have been no cause of abatement that all the co-partners were not before the court.

If all the other defendants had failed to answer, the defendant who applied for the removal could have answered, as he did, for himself, and the issues thus raised would have stood for trial. Why can they not be tried, as well in the federal as in the state court? And when tried, is not the controversy *finally determined*, so far as it concerns him, as effectually as if all the defendants were in the federal court?

If the plaintiff establishes that the defendant was a partner, and that the firm was indebted to him as he alleges, he recovers of the defendant and takes his judgment, and meanwhile his case proceeds as to the other defendants in the state court. And so, if the plaintiff fails, the defendant has judgment in his favor in the federal court, leaving the plaintiff and the other defendants to their litigation in the state court.

This view of the case encounters the objection that it may compel the plaintiff to litigate in two courts, but that

McGinnity v. White.

objection obtains in every similar case which falls within the act of 1866, for the express purpose of that enactment is to give the non-resident defendant a right to litigate separately in the federal court, in cases where his rights can be finally determined, which of necessity, as well as by the plain letter of the statute, leaves the residue of the litigation in the state tribunal.

MOTION DENIED.

DUNDY, J. concurs.

NOTE. — "Final determination of controversy" as to the defendants who apply to remove. (*Bixby v. Couse*, 8 Blatchf. 73; *Field v. Lounsdale* [tenants in common], 1 Deady, 288.)

"Final hearing or trial." (*Dart v. McKinney*, 9 Blatchf. 359; *Stevenson v. Williams*, 19 Wall. 572, 1873; *Waggener v. Cheek*, 2 Dillon, 565; *Akerly v. Vilas*, 1 Abb. C. C. 284; *Boggs v. Willard* [where supreme court of state reversed and ordered bill to be dismissed—held too late to remove under act of 1867], 4 Chi. Legal News, 325; *Johnson v. Monell* [voluntary change of residence pending suit on right of removal], 1 Woolw. 390; *Sands v. Smith*, 1 Dillon, 290.) The supreme judicial court of Massachusetts hold that, under the act of March 2, 1867, it is too late to remove after a trial has been entered on, although the jury disagree. (*Galpin v. Critchlow*, 13 Am. Law Reg. [N. S.] 187; but see cases last above cited.)

Act of March 2, 1867, is constitutional (*Chicago, etc. R. R. Co. v. Whitton*, 13 Wall. 270), and does not repeal act of July 27, 1866. (*Fields v. Lamb*, 1 Deady, 430.)

And under act of 1867, all the defendants, not merely nominal, must be entitled to removal. *Bixby v. Couse*, 8 Blatchf. 73. In this case it is even said that "they must unite in the petition for removal, or there can be no removal of the suit." See *Field v. Lounsdale*, 1 Deady, 288; and particularly *Sewing Machine Co. v. Sewing Machine Co.* Sup. Ct. U. S. 1873, 18 Wall. 558.

Under act of 1866, even as amended by act of 1867, it is not necessary to state "prejudice or local influence" in the affidavit, the ground of removal being citizenship. *Field v. Lamb*, 1 Deady, 430, 432; *Allen v. Ryerson*, 2 Dillon, 501.

"Amount in controversy." Interest may be included in determining the amount in controversy. *Roberts v. Nelson*, 8 Blatchf. 74; *King v. Wilson* (illegal taxes), 1 Dillon, 555.

 Kellogg v. Hughes.

Right of removal depends upon facts as they exist when the suit was brought (under act of 1789, sec. 12, *Roberts v. Nelson*, 8 Blatchf. 74), and when right is complete it cannot be defeated by amendment or other action of the state court. *Kanouse v. Martin*, 15 How. 198; *Ladd v. Tudor*, 3 Woodb. & Minot, 325. See *Kellogg v. Hughes*, *infra*.

S. J. KELLOGG v. JOHN HUGHES and CHARLES B. BICKLE.

Under the act of congress of March 2, 1867 (14 Stats. at Large, 558), an action may be removed from the state court of original jurisdiction, in which it is then pending, to the circuit court of the United States, after a judgment in favor of one of the parties has been wholly reversed by the state supreme court, and a trial *de novo* ordered, if the removal is applied for before the second trial is commenced. Following *Johnson v. Monell* (1 Woolw. 390).

(Before DILLON and DUNDY, JJ.)

Removal of Causes from State to Federal Court.—Act of March 2, 1867.—When Application Must Be Made.

IN 1872 the plaintiff commenced this suit in the state district court for the county of Otoe. The action was at law, to recover damages for the breach of a contract. An answer was filed, and at the March term, 1872, a trial was had, and verdict rendered for the plaintiff and judgment entered thereon. The defendants prosecuted a petition in error to the supreme court of the state; which, at the January term, 1874, reversed the judgment in favor of the plaintiff, and issued its mandate to the district court of Otoe county: "to proceed, without delay, to a trial *de novo* of the said action." Upon the filing of this mandate, and before the trial had been commenced, the *plaintiff*, under the act of Congress of March 2, 1867 (14 Stats. at Large, 558), applied, in due form, for the removal of the cause into this court, and its removal

Kellogg v. Hughes.

was ordered. And now in this court the defendants file a motion to remand the cause to the state court, on the sole ground that the removal was not applied for in time.

Calhoun & Croxton, for the motion.

Stevenson & Hayward, and *Mr. Lehmann*, contra.

DILLON, *Circuit Judge*.—By the statute the application for the removal may be made to the state court “at any time before the final hearing or trial of the suit.” We are aware of the diversity of opinion between the state courts on the one hand (*Gilpin v. Critchlow*, 13 Am. Law Reg. (N. S.) 137, and the cases cited by Mr. Chief Justice GRAY), and the federal courts on the other (*Ackerly v. Vilas*, 2 Bissell, 110; S. C. 3 *Ib.* 332; *Dart v. McKinney*, 9 Blatchf. 359; *Johnson v. Monell*, 1 Woolw. 390), as to what is to be considered a “final hearing or trial,” within the meaning of the act of congress.

In *Stevenson v. Williams*, the supreme court of the United States (19 Wall. 572), decided that the application for the removal must be made before “final judgment in the court of original jurisdiction,” and that it was too late to make it after the cause had reached the state appellate court. As after the removal, the cause is “to proceed in the federal court in the same manner as if brought there by original process,” clearly the cause can not be removed after judgment, and while that judgment is in force. But, in this case, the judgment of the state court in favor of the plaintiff, had been entirely reversed by the supreme court on error, and the court of original jurisdiction had become repossessed of the suit, with directions to proceed to a trial *de novo*. There is no existing judgment in the case, and it is, in all respects, in the same posture as before the first trial was had. That trial was adjudged a mis-trial, and in law there has been no trial of the rights of the parties. Their

Union Pacific Railroad Co. v. Merrick County.

rights are yet to be adjudicated, and there was, to use the language of Mr. Justice FIELD, in *Stevenson v. Williams, supra*, no "final judgment" in the state court when the application for the removal was made. We are inclined to think, if the question were *res nova* in this circuit, that the application was in time; but it is not necessary to enter upon an examination of the subject, since the case of *Johnson v. Monell, supra*, is decisive, and in this court has the force of an authoritative adjudication. Following its doctrine, the motion to remand must be denied.

MOTION DENIED.

DUNDY, J. concurs.

UNION PACIFIC RAILROAD COMPANY v. MERRICK COUNTY.

1. The issue of bonds by a county to a railroad company will not be restrained where the requirements of the statute authorizing the issue have been complied with.
2. A vote by a county to issue bonds to a given railroad company whose line runs to the county seat is not rendered invalid by a condition that a depot of the company shall be located within a specified distance of the county seat, nor by a condition that the railroad bridge over a large stream in the county shall be so constructed that it may be used as a free wagon bridge.

(Before DILLON, Circuit Judge.)

County Aid to Railways.—Statute Construed.—Conditions Annexed.

THIS is a bill in equity to restrain the county authorities of Merrick county from issuing certain bonds voted to the Midland Pacific Railway Company.

The statute of Nebraska provides "that any county or city in the State of Nebraska is hereby authorized to issue bonds

Union Pacific Railroad Co. v. Merrick County.

to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county, or city: *Provided*, The county commissioners or city council shall first submit the question of issuing such bonds to a vote of the legal voters of said county or city, in the manner prescribed by the statute."

At a session of the board of county commissioners of Merrick county, held at Lone Tree, upon the 25th day of July, 1873, it was by said board resolved that the following proposition be submitted to the electors of Merrick county, to wit: "Shall the county commissioners of Merrick county aforesaid, for the purpose of aiding in the construction, extension and completion of the Midland Pacific Railway from the city of Lincoln, in the county of Lancaster in said state, to the town of Lone Tree in said Merrick county, issue the bonds of said county in the sum of one hundred and twenty-five thousand dollars (\$125,000), payable to the Midland Pacific Railway Company, or bearer, to be dated the first day of January, A. D. 1875, and payable in twenty years from the date thereof, with interest thereon at the rate of ten per cent per annum from and after the date thereof, payable annually on coupons thereto attached. The principal and interest of said bonds to be paid in the city of New York, said bonds to be deposited with some national bank selected by the county commissioners of said county and the said Midland Pacific Railway Company, jointly. Said bonds for \$125,000 to be delivered by the national bank selected as aforesaid to said Midland Pacific Railroad Company, or order, when the said railway shall have been completed from Lincoln, aforesaid, to Lone Tree, aforesaid, and shall have regular trains running thereon for business; provided, said railway shall have been

Union Pacific Railroad Co. v. Merrick County.

completed and have through trains running regularly thereon, from Lincoln, aforesaid, to Lone Tree, aforesaid, on or before the 1st day of January, 1875; and, provided; also, the depot of said railway shall be located within one fourth of a mile of the court house of said county; and, provided, further, that said railroad company shall cross Prairie Island with their road, and shall plank their bridge at least eighteen feet in width from the north bank of said Prairie island to the north bank of Platte river for a wagon bridge, and shall open the same free for a public highway, and shall enter into a good and sufficient contract to keep and maintain said bridge as aforesaid for a highway for ten years from January 1st, 1875; and the county commissioners aforesaid shall cause to be levied annually, in addition to the other taxes, an amount of tax sufficient to pay the interest, and after the year 1883 an amount of tax sufficient to pay the principal thereof, provided, such tax so to be levied shall not exceed the amount authorized by law to aid the construction of works of internal improvement in said state of Nebraska, etc., etc."

The other material facts appear in the opinion of the court.

A. J. Poppleton and E. Wakely, for the plaintiff.

M. H. Sessions, for the defendants.

DILLON, *Circuit Judge*.—This is a bill by the Union Pacific Railroad Company, as the owner of a very considerable portion of the taxable property within the county of Merrick, to restrain the county commissioners of that county from issuing \$125,000 of the bonds of the county to the Midland Pacific Railway Company pursuant to a vote of the people of the county, at an election held on the 30th day of August, 1873. The cause is before the court on final hearing upon the pleadings and proofs.

Union Pacific Railroad Co. v. Merrick County.

The counsel for the plaintiff relies mainly upon two grounds for the relief sought. These will be briefly noticed.

The first is that no copy of the question submitted to the voters of the county was posted up at the place of voting during the day of election in Lone Tree precinct, the town of Lone Tree being the county seat, and that precinct giving in favor of the proposition a larger vote than the majority for the proposition throughout the county, thus controlling the result. We held on demurrer to the bill that the law of Nebraska made it essential to the regularity of the vote that "a copy of the question submitted should be posted up at the places of voting;" but the proofs quite satisfactorily show that the law was complied with in this respect. It is conceded that a copy of the question was posted on the front door of the court house building (in one of the rooms in which the election was held), and was the usual place for posting official and legal notices; and the evidence also tends very strongly to show that another notice was posted on the door of the very room (the sheriff's office) in the court house in which the election was held. This ground of relief, therefore, falls upon the proofs.

The next ground relied on by the complainant is that "the proposition or question submitted involved three distinct subjects to be passed on, and consequently the submission was illegal. First, the construction of the railroad to Lone Tree. Second, the establishment of the depot at a particular place. Third, the construction of a wagon bridge over the Platte river." In support of this position, counsel rely upon *Lewis v. Bourbon County*, decided by the supreme court of Kansas, 12 Kansas, 186, 1873, and upon *Supervisors v. Railroad Company*, 21 Ill. 338; *People v. Tazewell County*, 22 Ill. 147; *Clark v. Hancock County*, 27 Ill. 310; and *McMillan v. Lee County*, 3 Iowa, 311.

Without examining or questioning these cases, our opinion is that the present case does not fall within the principle

Union Pacific Railroad Co. v. Merrick County.

they assert. There were not three distinct propositions submitted or three separate projects sought to be aided. On the contrary, only one proposition was submitted, viz.: to vote aid to the extent of \$125,000 to the Midland Pacific Railway Company; but this aid was to be upon condition that the depot of the company should be located within one-fourth mile of the court house of the county, and upon the further condition that the company would so construct its railroad bridge over the Platte river, that it might be used as a wagon bridge, and would agree that it might be so used for ten years, and to that end would keep it in repair during that period.

These conditions are reasonable in themselves, and such as the county authorities might, in their judgment, require. They are conditions obviously in the interest of the county, and if the vote would have been valid without them, we cannot see why they render it illegal. *Railroad Company v. Leavenworth*, 1 Dillon C. C. R. 394, 398; *Railroad Company v. Baltimore*, 21 Md. 93; *Phillips v. Albany, et al.* 28 Wis. 340; *Lawson v. Railroad Company*, 30 Wis. 597; *Rhey v. Railroad Company*, 28 Pa. St. 261; *Ib.* 318.

The law of the state on the subject of voting aid to railroads has been sustained by the supreme court of the United States as valid in the Otoe county case. We may doubt the wisdom of the enactment, but being valid we have no right to overthrow it; and as the law in the case before us seems to have been complied with in all essential particulars, we see no ground on which we would be justified in restraining the issue of the bonds which a majority of the people of the county have voted.

BILL DISMISSED.

NOTE.—See *Union Pacific R. R. Co. & Lincoln County*, ante, as to restraining the issue of bonds by public corporations.

In re King.

In re ROBERT G. KING, an Alleged Bankrupt.

On a creditor's petition in bankruptcy on which issue was taken, a jury had rendered a defective special verdict, but no general verdict, before the amended bankrupt act of June 22, 1874, was enacted, and the case was pending on a motion by the creditors for an adjudication of bankruptcy on the special verdict, and notwithstanding it, when said amendatory act took effect, and afterwards by consent of court an amended petition under said amended act was filed and issue taken thereon: *Held*, that the action of the court in subsequently dismissing the case on the strength of the special verdict was erroneous, and that the issues made under the amended act by the amended petition should have been determined.

(*Before DILLON, Circuit Judge.*)

*Bankrupt Act of June 22, 1874.—Defective Special Verdict.—
Petition for Review in Bankruptcy.*

A creditor's petition in bankruptcy was filed against King, March 17, 1874. Denial of acts of bankruptcy, and trial to jury May 4, 1874, who returned a special verdict. Motion by petitioning creditors for an adjudication on the special verdict, and notwithstanding the same, while this motion was undetermined, the amended act of June 22, 1874, went into effect, and on October 17, 1874, an amended petition was filed by consent of court bringing in additional creditors, and stating acts of bankruptcy in compliance with said amended act. King filed an answer denying the alleged acts of bankruptcy, and denying that the requisite number and amount of creditors were concurring in the proceeding. The court found, it seems, that the requisite number were assenting to the proceeding; but on the 18th day of November, 1874, entered an order "stating, that the cause came on to be heard on the verdict of the jury rendered at the May term, before the pleadings were changed to comply with the act of June 22, 1874, and the court being fully advised, orders that the proceedings be dismissed, and that

In re King.

the marshal turn over to R. G. King all the property held under the provisional warrant heretofore issued."

To review and re-examine this order, the petitioning creditors bring the case here by petition in review.

C. S. Chase and W. D. Bartholomew, for the creditors.

No appearance for King.

DILLON, *Circuit Judge*.—I am of opinion that the special verdict is defective in not covering the issues or affording a basis of facts for a decision, for or against the petition. The result is, that there was simply a mis-trial, leaving the case pending in the bankruptcy court. It was so pending when the amended bankrupt act of June 22, 1874, took effect, and the retroactive provisions of that act applied to it as an undetermined case, requiring the assent of one-fourth in number and one-third in value of the creditors.

The petition was amended, alleging that the requisite proportion of creditors as to number and value concurred in the proceeding, and stating acts of bankruptcy to comply with the new provisions of law, and issue was taken on this amended petition by the debtor. These issues as to the acts of bankruptcy were never tried, but the court entered an order on the 18th day of November, 1874, based upon the special verdict of May 4th, 1874, dismissing the petition of the creditors and all proceedings under the same, and ordering the marshal to restore to the debtor all property held under the provisional warrant. This was erroneous. The special verdict being defective, there was a mis-trial, leaving the case pending in the court, and the order ought to have been to set aside the special verdict and to have the issues made by the amended pleadings, tried and determined in the usual manner. The order of the 18th day of November, 1874, above mentioned, is reversed and

Turton v. Union Pacific Railroad Co.

set aside, and the district court ordered to proceed in the case in a manner not inconsistent with the order herein made, and to require the marshal to take possession of the property of debtor.

ORDERED ACCORDINGLY.

GEORGE J. TURTON v. UNION PACIFIC RAILROAD COMPANY.

Under the legislation of congress, the Union Pacific Railroad Company, sued in a state court for negligence, on making application in due form, stating, *inter alia*, that it has a defense to the action arising under a law of the United States, viz, under the charter of the company, may remove the suit to the circuit court of the United States, and on such removal the cause may be fully tried on the merits.

(Before MILLER, Circuit Justice.)

Federal Jurisdiction over the Union Pacific Railroad Company by Removal from the State Court, under the Act of July 27, 1868. (15 Stats. at Large, 227.)

THIS action was originally commenced in one of the state courts of Nebraska, by the plaintiff, a citizen of that state, against the defendant, to recover damages alleged to have been sustained by the plaintiff, caused by the negligence of the defendant in operating its road. Answer in denial filed in the state court. Afterwards the defendant filed its petition in the state court for the removal of the cause into this court, stating, *inter alia*, therein, that it was a corporation created and organized under and by virtue of a law of the United States, approved July 1st, 1862, and that it is not a banking corporation, and that it has a defense to and in the said action arising under a law of the United States, to-wit: under the act last mentioned. Surety was accepted, and the cause ordered to be removed by the state court. In the

Bauman v. Union Pacific Railroad Co.

circuit court the plaintiff filed a plea to the jurisdiction of the court, which the defendant denied. The plea was submitted on an agreed statement of facts, which admitted that no defense is claimed to exist or is sought to be made under any other law of the United States than the charter of the defendant. 12 Stats. at Large, 489.

Mr. Marlow, for the plaintiff.

Mr. Poppleton, for the defendant.

MILLER, *Circuit Justice*. — I am of opinion that the cause was properly removed into this court under the act of congress relating to the removal of suits against federal corporations, and that it may be fully tried here upon its merits. Plea to the jurisdiction overruled.

JUDGMENT ACCORDINGLY.

NOTE.—See Rev. Stats. section, 640.

CHARLES J. BAUMAN v. UNION PACIFIC RAILROAD CO.

Under the charter of the Union Pacific Railroad Company, it may sue and be sued in the circuit court of the United States for the district of Nebraska, without reference to the citizenship of the adverse party.

(Before MILLER, *Circuit Justice*.)

Federal Jurisdiction Over the Union Pacific Railroad Company.

MOTION by the defendant to dismiss the action for want of jurisdiction in the court.

A. J. Poppleton and *E. Wakely*, for the motion.

W. M. Francis, contra.

Oliver v. Omaha.

MILLER, *Circuit Justice*. — The petition alleges that the plaintiff is a citizen of the state of Nebraska, and that the defendant is a corporation created by and existing under the laws of the United States; and the question is whether it is suable in this court by a citizen of the state of Nebraska. Under the charter of the defendant company, I have heretofore held that it was suable in this court by a citizen of another state (*Smith v. Union Pacific Railroad Co.* 2 Dillon C. C. R. 278), and I am of opinion, on consideration of the provisions of the charter, that it may sue and be sued in this district, without reference to the citizenship of the adverse party. 12 Stats. at Large, 489.

MOTION DENIED.

NOTE.—See *Turton v. U. P. R. Co.*, *ante*, p. 366.

GEORGE T. OLIVER v. CITY OF OMAHA.

1. On a question of restraining the collection of city taxes, upon lands within the city limits, used exclusively for agricultural purposes, this court is bound by the decision of the supreme court of the state.
2. A citizen of another state, in the case of an illegal tax upon his real property, levied under state authority, may proceed originally in this court, notwithstanding a provision of the state statutes, requiring a previous decree in the state chancery court, before any sale for taxes can be made.

(Before MILLER, *Circuit Justice*.)

Injunction to Restrain Illegal Taxes.—Authoritative Force of State Adjudications.—Federal Jurisdiction.

THIS was an action brought to restrain the collection of taxes by the city of Omaha on the plaintiff's lands lying within the corporate boundaries of said city, but used exclusively for agricultural purposes. No suit for the taxes had been commenced in the state court when this suit was brought. Submitted upon the pleadings and agreed state of facts.

Oliver v. Omaha.

J. M. Woolworth, for the plaintiff.

J. M. Thurston, for the defendant.

The 15th proposition in Mr. Thurston's brief, referred to below, is as follows : —

15. The relief sought is to restrain the sale of the land for the taxes, which sale, if made, would cast a cloud upon plaintiff's title. By general statutes in force at the commencement of this suit (see Gen. Stats. p. 940), after the first day of December, 1873, no sales of land could be made by treasurers for taxes levied thereon prior to the year 1872. The only manner in which sale for such taxes could be made after said date, was by a decree in chancery granted by the district court of the state, after judicial proceedings had therefor in the manner pointed out by the aforesaid statute, in which proceedings every party interested would have an opportunity to be heard upon the merits and equities, and which proceedings to obtain such a decree have been duly instituted and are now pending. The effect of a decree herein, then, would be to enjoin the action of a court of competent jurisdiction from rendering a decree of sale, or hearing the rights of the respective parties therein.

MILLER, *Circuit Justice*.—I am satisfied that the case comes within the principle of *Bradshaw v. Omaha*, 1 Neb. 16, and this court is bound by it. The only doubt I have had is raised by the 15th proposition of Mr. Thurston's printed argument; but, as the present plaintiff is entitled to come into the federal court, I see no good reason why he should wait until he is sued in a state court with many others, who may have no such defence as he has, and then ask to remove his case into the federal court. Therefore, let a decree be entered for the plaintiff, for a perpetual injunction against the collection of the tax.

DECREE ACCORDINGLY.

REPORTS
OF
CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF KANSAS.

CYRUS TOWNSEND, Assignee in Bankruptcy of O. H. Viergutz, v. THOMAS LEONARD, Sheriff, etc. and CHARLES H. POND.

1. Property in the hands of the sheriff, under execution from a state court levied *before* the proceedings in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the *possession* of the sheriff by the federal court.
2. In such a case, the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Possession of Sheriff Under Levy Made Before Bankruptcy Proceedings were Commenced.

JUDGMENTS against the bankrupt were rendered in the state court, and levies made thereunder by the sheriff, *before* the proceedings in bankruptcy were commenced. The

Townsend v. Leonard.

sheriff has made sales under the levies, and the proceeds are in his hands. This is a bill in equity by the assignee in bankruptcy, against the sheriff and the execution plaintiffs, attacking the judgment, levy and sale, as having been obtained and made contrary to the bankrupt act, and with intent to acquire an illegal preference. The federal district court granted an order restraining the sheriff from paying over the proceeds of the sales to the execution plaintiffs, and the proceeds are still in the hands of the sheriff.

The bill prays for a perpetual injunction against the sheriff from paying over the proceeds to the execution plaintiffs, and asks that the proceeds shall be paid over to the complainant, as assignee in bankruptcy. An answer has been filed by the sheriff, and proofs taken, and the cause is now upon final hearing. The other defendants have not answered, not having been personally served.

Z. E. Britton and F. P. Fitzwilliam, for the plaintiff.

Clough & Wheat, for the defendants.

DILLON, *Circuit Judge*.—The property or money of which the assignee, by the bill of complaint, seeks to obtain possession, is in the hands of the sheriff, and was obtained under an execution, which was issued and levied upon the property of the bankrupt before the proceedings in bankruptcy were commenced. Assuming that the bill in other respects presents a case of equity cognizance, can this court take jurisdiction of the sheriff and the fund in his hands, and subject him and the fund to its control? That this cannot be done on general principles, is conclusively settled. (*Peck v. Jenness*, 7 How. 612; *Taylor v. Carryl*, 20 How. 583; *Buck v. Colbath*, 3 Wall. 334.)

Is the rule in this respect changed by the bankrupt act? The presiding justice of this circuit has held that it is not. (*Johnson, Assignee, v. Bishop*, 1 Woolw. C. C. Rep. 324.) And

Kuhn v. McMillan.

such seems to be the opinion of the supreme court of the United States in the recent case of *Marshall v. Knox*, 8 Bank. Reg. 97; S. C. 16 Wall. 551. In the case last cited, Mr. Justice BRADLEY says, *arguendo*, that 'where an execution on final judgment has been levied by a sheriff prior to the commencement of proceedings in bankruptcy, the possession of the sheriff cannot be disturbed by the assignee; the assignee is only entitled to claim the residue in the hands of the sheriff after satisfying the execution in his hands.' In *Johnson v. Bishop*, *supra*, Mr. Justice MILLER says: "The possession of the sheriff is the possession of the court, by the command of whose writ he seized the property. And so long as the proceedings in virtue of which it is taken, are pending, that possession will not be interfered with by any other court."

The bill must, therefore, be dismissed; but it will be without prejudice to any other action or suit by the assignee against the judgment creditors of the bankrupt or either of them.

BILL DISMISSED.

NOTE.—See *Bradley v. Frost*, *post*, and *Wilson v. City Bank of St. Paul*, decided by the supreme court, December term, 1878, 17 Wall. 478, and cases following it decided subsequently by that court.

KUHN, NETTER, & Co. v. J. W. McMILLAN.

1. Where the laws of a state provide that bonds given to release property from attachment, and conditioned for its re-delivery to the officer, shall form part of the record, and that judgment thereon, in the event of the plaintiff's recovery, shall be entered against the principal and surety of such bond without *scire facias* or notice, a judgment thus entered is not void as to the surety for want of notice, although such surety may at the time be a non-resident of the state.

Kuhn v. McMillan.

2. Record of a judgment entry held to show an appearance by the party praying an appeal from such judgment, as to proceedings subsequent thereto.

(Before DILLON, Circuit Judge.)

Foreign Judgment.—Notice.—Jurisdiction.

IN 1866 the present plaintiffs commenced in a court in Tennessee an attachment suit against Fessenden & Co. and the sheriff levied the writ of attachment upon property worth twice the amount of their claim against Fessenden & Co. Under the statute of that state, Fessenden & Co. as principals, and the present defendant as *surety*, executed to the plaintiffs a delivery bond in the sum of \$1,800, reciting the plaintiff's suit, the levy of the attachment, etc., and conditioned that "if the attached property should be brought forward and delivered to the sheriff when ordered by the court, or said debt and costs shall be paid and satisfied before that time to the said sheriff, then this obligation to be void; otherwise to be in full force." Fessenden & Co. contested the plaintiffs' claim, but in 1867 the plaintiffs recovered judgment against them, and the record of that recovery, after reciting the execution of said delivery bond, also shows judgment against the present defendant, McMillan, as the surety, jointly with his principals, from which judgment "*the defendants*" prayed an appeal to the supreme court of the state. In 1869 the supreme court affirmed the judgment against Fessenden & Co. but reversed the judgment as to McMillan, on the ground that when judgment was entered against McMillan, "no breach of the bond had occurred;" but remanded the cause to the court of original jurisdiction, "with directions to order McMillan to deliver the property attached to the sheriff in sixty days from the date of such order, or pay the debt, and upon his failure to do so, the court may enter up a judgment against him and Fessenden & Co. upon said bond, for the amount of the

Kuhn v. McMillan.

plaintiffs' judgment against Fessenden & Co. with interest and costs." The court below, July 19, 1869, made the order as directed, and afterwards, on March 29, 1872, the court, after reciting the amount of the judgment against Fessenden & Co. adjudged "that unless the said McMillan pay said judgment within sixty days from the date hereof, execution shall issue against the said McMillan and Fessenden & Co."

The present action is brought in this court by the plaintiffs against McMillan on the said judgment of March 29, 1872.

The defense is that the defendant never appeared, in person or by attorney, to the suit in Tennessee, nor was he served with summons or process in said action; and in support of this defense it is stipulated "that in March, 1866, McMillan was, and ever since has been, a non-resident of Tennessee, and has not been in that state since June, 1866." This is the only proof in the case for the defendant. It is agreed that the statute of Tennessee in force when the proceedings in that state took place, contains a provision by which delivery bonds, such as the one signed by the defendant, are required "to be returned into court and constitute part of the record." (Code, sec. 3513.) Also the provision that the "court may enter up judgment on the bond against the defendant *and his sureties*, in the event of a recovery by the plaintiff." (*Ib.* sec. 3514.) Also the provision that "all bonds * * * taken in the progress of a cause form part of the record, and judgment may be rendered thereon, to the extent of the respective liabilities of the parties, upon motion, *without scire facias or notice.*" (*Ib.* sec. 3109.)

Barker & Sommerfield, for the plaintiffs.

Hutchings & Bretherton, for the defendant.

DILLON, *Circuit Judge*.—There must be judgment for the plaintiffs. The stipulation as to the non-residence of the

Kuhn v. McMillan.

defendant, which is his only proof, does not overcome the record entry to the effect that after a joint judgment had been entered against Fessenden & Co. and McMillan, that "the *defendants*" prayed an appeal, on which appeal the judgment against McMillan was reversed. The appellate court regarded the present defendant as being before it on that appeal, and reversed the judgment against him. But, without resting my judgment upon this view, I am of opinion that, under the laws of Tennessee, the judgment against the defendant as surety on the delivery bond was authorized, and is not, as defendant's counsel contends, void for want of notice. Property had been attached and was in the custody of the court. The defendant signed a bond to release the property, and conditioned that he would be liable for any debt the plaintiffs might recover, unless the property released should be re-delivered to the sheriff when ordered by the court. The bond takes the place of the property for which it is substituted, and the statute requires it to be returned and filed in court. By the statute in force at the time the defendant signed the bond, it was provided that the bond should constitute part of the record, and that judgment might be entered thereon against the principal and surety, in the event of a recovery against the principal, without *scire facias* or notice.

The defendant, therefore, by the execution of the bond in the course of a pending cause, connected his fortunes with the fortunes of his principal, so far, at least, as to authorize the court to enter judgment against them thereon. By the execution of the bond under the statute, the defendant places himself in court, and agrees that judgment may be entered against him, without further process, if judgment is entered against the principal obligors. It is obvious that such is the view taken of the statute by the supreme court of the state, since that court directed the entry of the very judgment which is the basis of the present action. Under

Savings Association v. Topeka.

the constitution and legislation of congress, that judgment is entitled to the same faith and credit that are due to it in the state from which it came.

Our conclusion is well sustained by authority. (*Pratt v. Donovan*, 10 Wis. 378; *McRae v. Mattoon*, 13 Pick. 53; Bigelow on Estoppel, 226, and cases cited.) And, under the statutory provisions of the state of Tennessee, the conclusion reached can, perhaps, be reconciled with cases which, as respects the right of special bail to notice, differ from those above referred to. (*Robinson v. Ward*, 8 Johns. 86; *Holt v. Alloway*, 2 Blackf. 108.)

JUDGMENT FOR THE PLAINTIFFS.

CITIZENS' SAVINGS ASSOCIATION OF CLEVELAND, OHIO, v.
CITY OF TOPEKA.

1. Taxation can only be authorized for *public* as distinguished from *private* purposes.
2. A statute which authorizes a municipality to issue bonds, that can only be paid by taxation, for the benefit of a manufacturing enterprise of private persons, is void, because it violates the fundamental rights of property, since the purpose is essentially private in its nature, although the public may be incidentally benefited.

(Before DILLON, Circuit Judge.)

Constitutional Law.—Limits of Taxing Power.—Aid to Private Enterprises.

ACTION upon interest coupons to bonds issued by the city of Topeka. Demurrer to petition.

A. Ennis, for the plaintiff.

A. L. Williams, for the defendant.

Savings Association v. Topeka.

DILLON, *Circuit Judge*.—The city of Topeka issued one hundred bonds of \$1,000 each, as a *donation* to the King Wrought Iron Bridge Manufacturing and Iron Works Company, of that place, to aid it in establishing therein its manufactory of iron bridges. The bonds are payable to that company and purport to be issued in pursuance of section 76, of an act of the legislature of Kansas, to incorporate cities of the second class, approved February 29, 1872 (Laws 1872, p. 192), and of an act approved March 2, 1872, to authorize cities and counties to issue bonds to build bridges, aid railroads, water-powers, and other works of internal improvement (Laws 1872, p. 110). The purpose for which these bonds were issued appears on their face, and is stated in the petition. It is alleged that the city has paid one year's interest thereon out of funds raised by taxation, and that it was after such payment that the plaintiff became the owner of the bonds and the coupons in suit, for value.

I concede that the legislative provision is broad enough to warrant the issue of these bonds by the city of Topeka, and the demurrer must be overruled if the authority to this end conferred upon the city is one which the legislature had the rightful power to grant. This question I have already decided in the case of the *Commercial Bank of Cleveland v. The City of Iola*, 2 Dillon, 353. I have given at some length the reasons for the conclusion that bonds like those in suit are absolutely void. That opinion was deliberately formed; and I am still satisfied with it and adhere to it. The payment of interest cannot cure the absolute want of power. It is not sufficient to distinguish this case from the one cited. Following that case, the demurrer will be sustained and judgment entered for the city.

JUDGMENT ACCORDINGLY.

NOTE.—Before the decision in the *Iola case* (2 Dillon, 353), it is estimated that over \$2,000,000 of bonds had been issued in Kansas to aid

White v. Leary.

private enterprises, such as hotels, manufactories, etc., and at the time that decision was given, preparations to issue large amounts of similar bonds were making. To the judgment in that case and the Topeka case, writs of error were prosecuted and both were affirmed by the supreme court in February, 1874. The opinion of the court was given in the Topeka case, which was very carefully prepared by Mr. Justice MILLER, and contains the sanction of that high tribunal to sound principles of constitutional law, which have been too often overlooked or disregarded in this country. [REP.]

WHITE v. LEAHY.

Under the 11th section of the judiciary act the assignee of a chose in action may sue in the federal court if the assignor might at the time *suit was brought* have there prosecuted the suit if no assignment had been made; and this, although the assignor *was at the time the assignment was made*, a citizen of the same state with the maker.

(Before MILLER and DILLON, JJ.)

*Jurisdiction.—Judiciary Act.—Chose in Action.—Assignment.—
Right of Assignee to Sue.*

BILL to foreclose mortgage brought by the plaintiff as an assignee of the note and mortgage in suit. The plaintiff is a citizen of Missouri. The maker of the note secured by the mortgage, and who is the mortgagor, and is also the present defendant, is a citizen of Kansas, and was at the time the note and mortgage were made and assigned to the plaintiff. The payee at the time the note was made and the mortgage executed was also a citizen of Kansas, and he was also a citizen of that state when he indorsed the note and assigned the mortgage and delivered the same to the plaintiff in Missouri. But at the *time this suit was brought* he (the payee) was a citizen of another state (Texas) than Kansas. The question was, whether this court had jurisdiction of the suit.

Trust Company v. Maquillan.

N. C. McFarland, for the plaintiff.

McComas & McKeighan, for the defendant.

DILLON, *Circuit Judge*.—The judiciary act (sec. 11) provides that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no such assignment had been made," etc.

If no assignment of this note had been made, the assignor might, being at the time when suit was brought a citizen of Texas, have then commenced it; and under the statute his assignee has the same right. If the restriction on the assignee does not exist at the time suit is commenced, the court has jurisdiction if the case involves the requisite amount and is between a citizen of the state where the suit is brought and a citizen of another state. The plea to the jurisdiction is overruled.

PLEA OVERRULED.

NOTE.—See *Thaxter v. Hatch*, 6 McLean, 68, and the change in the 11th section of judiciary act by the act of March 3d, 1875.

FARMER'S LOAN AND TRUST COMPANY v. SAMUEL MAQUILLAN.

Corporations are within the act of March 2, 1867 (14 Stats. at Large, 558), in respect to the removal of causes from state to federal courts, and on a petition, and the making by the proper officer of the corporation of the required affidavit, are entitled to the benefit of the act.

(Before MILLER and DILLON, JJ.)

Removal of Suits.—Act March 2, 1867.—Corporations.

THE plaintiff is a New York corporation and commenced this suit in one of the state courts of Kansas, and afterwards

Trust Company v. Maquillan.

made an application in the state court to remove the same to this court. The petition and affidavit for removal were made under the act of congress of March 2, 1867. The state court ordered the removal; and in this court the defendant moves to remand the cause to the state court. The ground of the motion is that corporations are not within the act of March 2, 1867.

Doniphan & Reed, for the plaintiff.

Nathan Price, for the defendant.

MILLER, *Circuit Justice*, orally delivering the opinion of the court, in substance said :

I think this motion must be denied. A great proportion of causes in the federal courts are those in which corporations are parties, and which come by transfer from the state courts, and it was never before claimed to me that they were not within the acts of congress on that subject, or within the act of March 2, 1867. My impression in favor of the jurisdiction in this particular class of cases was so strong that I should have overruled the motion at once but for the circumstance that a decision of the court of appeals of New York, and a decision of the supreme court of Minnesota, were produced, the former doubtfully, the latter positively, denying to corporations the right to remove cases under the act of March 2, 1867 (14 Stats. at Large, 550).

I have considered the opinions in those cases, and with great respect for the courts whose judgments they pronounce, I think their views upon the subject are not sound, and that, not unnaturally, perhaps, they incline too much to narrow and cripple the federal jurisdiction. The history of the state court decisions on the subject of federal jurisdiction from the case of *Cohens v. Virginia*, 6 Wheat. 464, shows that, if the state courts could have defined the limits

United States v. O'Brian.

of that jurisdiction, the fabric of federal jurisprudence, as it exists to-day in this country, would have been shorn of its beauty and symmetry, and the system of its efficacy and usefulness.

I am not impressed with the soundness of the argument that because corporations cannot make an affidavit, except through the proper officers, they were not within the contemplation of congress. I think that the proper officers of corporations may make the necessary affidavit to procure the removal.

I do not join in the condemnation of the act of 1867. It does not allow the removal solely on the ground of citizenship. It requires the requisite citizenship to exist, and in addition thereto requires the existence of prejudice or local influence to be shown by affidavit. In this respect the policy of that act is not unlike that which prevails in perhaps all the states in regard to the change of venue from one county, or one judicial district, to another. *Johnson v. Monell*, 1 Woolw. 390. The object in each case is to secure an impartial tribunal, and the federal courts are not courts for non-residents more than for residents, and no injustice is done to the latter to be compelled there to litigate controversies which they may have with citizens of other states.

DILLON, *Circuit Judge*, concurs.

MOTION DENIED.

NOTE.—See *Minnett v. Milwaukee & St. Paul Railway*, post.

THE UNITED STATES v. THOMAS M. O'BRIAN.

A "fleeing from justice" within the meaning of the act of congress limiting criminal prosecutions, is to leave one's home, residence or known place of abode, within the district, or to conceal one's self therein, with intent, in either case, to avoid detection or punishment for some public offence against the *United States*.

United States v. O'Brian.

(Before DILLON, Circuit Judge.)

*"Fleeing from Justice."—Construction of the Act of 1790.—
Limitation.*

THE defendant was indicted under the act of February 5th, 1867, sec. 1 (14 Stats. at Large, 383), for selling to Hines & Eaves, bankers in Leavenworth, a check drawn by the pay-master of the army of the United States, upon the assistant United States treasurer of New York, with a forged indorsement of the name of the payee thereon, with the intent by the said act prohibited. Under the plea of not guilty, the main question in the case was whether the offense was barred by the statute of limitations (1 Stats. at Large, 117, sec. 32; 1 Bright. Dig. 322, sec. 107). To take the case out of the statute, the government relied upon the proviso that the act shall not "extend to persons *fleeing from justice*."

In relation to this defense, the jury was charged orally as given below.

C. I. Scofield, district attorney, and *Thomas Ryan*, for the United States.

Thos. P. Fenlon, and *J. W. English*, for the defendant.

DILLON, *Circuit Judge*.—The offense is charged to have been committed on the 31st day of December, 1867, and the indictment was not found until the 6th day of May, 1873—more than five years afterwards. The indictment alleges also that the defendant is a person fleeing from justice in this district, and that he has been thus fleeing since the first day of December, 1869.

The limitation statutes of congress require an indictment for an offense, such as that here charged, to be found within *two* years from the time the offense was committed; but the statute contains a *proviso*, that the bar or the limitation

United States v. O'Brian.

shall not "extend to any person or persons *fleeing from justice*."

It becomes necessary to construe this proviso. It is in evidence that the defendant left the district of Kansas in August, 1869, and that he was afterwards publicly employed in the pay-master's department of the army in New Orleans, and that he afterwards resided for a time in Little Rock, in St. Louis, and in Colorado, where he was arrested after this indictment was found. Before August, 1869, he had resided for some years in Leavenworth, doing business as a claim agent and was well known there, and evidence has been introduced by the defendant to show that after he left Leavenworth, he was seen by different citizens of that place, in the cities above named, and that his whereabouts was generally known in Leavenworth and among all his acquaintances.

There is also evidence that there was a criminal proceeding pending against him when he left Kansas, in the state court at Leavenworth for a violation of the laws of the state. There is no evidence that the defendant voluntarily returned to the district of Kansas, or had been therein since his departure in 1869.

It is necessary to determine upon the evidence, the motives of the defendant in leaving the state in the summer of 1869 — or more specifically to determine whether he at that time fled from justice.

What is "fleeing from justice," within the meaning of the statute? Having reference to the facts in this case, my answer is, it means to leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense against the United States. It results from, or is implied in this definition, that if the defendant left his home in Leavenworth solely to avoid the criminal justice of the *state* of Kansas, and not to avoid the criminal justice of the United States — this will not deprive him of the two years limitation.

United States v. O'Brian.

The criminal codes of the general government and of the states are entirely distinct, as was held by this court in Hawthorne's case (1 Dillon, C. C. R. 422); and in my opinion it cannot be supposed that congress intended to make any provision in respect to persons fleeing from the justice of the states.

It is implied also in the definition above given, that mere departure by the defendant from the limits of the district of Kansas, irrespective of the motives and purposes of such departure, is not a fleeing from justice. An offender may flee from justice, within the meaning of the statute under consideration, though he never left the limits of the district; as for example, by secretly concealing himself, or by not being usually and publicly known as being within it. If the defendant, after his departure from Kansas, publicly resided in various places in the United States, did not conceal his whereabouts, and kept up an open correspondence with his friends in Kansas, these facts may be properly taken into view by the jury in connection with other circumstances in evidence, in forming their opinion of his intent and purpose in leaving the state in August, 1869.

[The jury found for the defendant, on the ground that the prosecution for the offense was barred.]

NOTE.—The decisions upon the proviso of the act of April 30th, 1790, as to "fleeing from justice," are not numerous.

It was decided by Chief Justice ELLSWORTH in Williams's case, that it need not be a fleeing from prosecution already begun—so stated by Mr. District Judge EDWARDS in the *United States v. Smith*, which was a case in the circuit court for the district of Connecticut, reported 4 Day, 121, 1809, and where the same view was taken. Nor need it be fleeing from process issued. *United States v. White*, 5 Cranch, C. C. R. 38, 1836; S. C. *Ib.* 116, 368, 457.

Whether mere departure from the United States is a fleeing from justice, or whether if the defendant fled the district, but within two years openly returned to it, he can avail himself of the statute—see the cases above cited.

The case of O'Brian seems to be the first one which has ruled the

Usher v. McBratney.

point that the fleeing must have been from the criminal justice of the United States—and that is not sufficient if the sole motive of the defendant in leaving his known place of abode was to avoid the criminal justice of the state. The point, however, is not free from difficulty.

Although the indictment in O'Brian's case alleged that the defendant had fled from justice, this is not necessary. The defendant may avail himself of the statute of limitations, either by special plea or under the general issue. If he pleads specially, the government may reply that he fled from justice. And under the general issue, the prosecutor may introduce evidence to bring the defendant within the exception of the statute. *United States v. Cook*, 17 Wall. 168, decided at the December term, 1872, of the United States supreme court, where the subject is fully examined by Mr. Justice CLIFFORD; S. C. with valuable note, 12 Am. Law Reg. (N. S.) 682.

JOHN P. USHER v. ROBERT McBRATNEY.

A contract providing a compensation for obtaining legislation, or to prevent legislative investigation into the affairs of a railway corporation, is void:—this principle applied and held to vitiate the defendant's claim to the land in controversy, and the complainant's title was quieted.

(Before DILLON, Circuit Judge.)

Lobby Services.—Contracts therefor Void.—Estoppel.—Judgment Between Other Parties.

THE land in question, sec. 14, T. 12, R. 20, in Leavenworth county, is part of the land which the Leavenworth, Pawnee, and Western Railroad Company was authorized to purchase by the treaty with the Delawares, of 1860 and 1861 (12 Stats. at Large, 1129, 1177). The name of that company was changed, and the Kansas Pacific Railway Company is its legal successor. The plaintiff has a title to the section of land in controversy, by deed from the Kansas Pacific Railway Company, the patentee, but subsequent in

Usher v. McBratney.

date to whatever rights the defendant has under the agreement of April 9, 1862, and the title bond given to the defendant in consequence thereof, by the president and secretary of the railway company under its seal, dated December 15, 1862. On the 9th day of April, 1862, J. C. Stone, then acting for the railway corporation, made and delivered to the defendant a writing agreeing to convey to him "four sections of the land acquired of the Delawares, and four to be acquired from the Pottawattamies, provided that the treaty now pending before the United States senate for the purpose of securing said last named land shall be ratified without delay, *and provided that no investigation of the affairs of the company shall be entered upon by the senate, with the consent of the Kansas senators, or any other act done which shall tend to delay the construction of the road.* For the L. P. & W. R. R. Co. J. C. Stone, attorney. Washington, April 9th, 1862."

The bill prayed to quiet the plaintiff's title—he being in possession. The answer, after denying some of the allegations of the bill, set up that the contract under which the lands were acquired by Shoemaker & Co. were so acquired under a contract fraudulently entered into by the directors of the company, they being personally interested in the contract, of which the plaintiff had knowledge, and the answer also pleaded a recovery of the land in the state courts by the defendant, in a suit against the railway company, as an estoppel upon the plaintiff, whose rights were acquired before such suit, but whose deed was not obtained until afterwards. Replication and proofs.

J. P. Usher & C. E. Bretherton, for the plaintiff.

Clough & Wheat, and *Griswold & Britton*, for the defendant.

DILLON, *Circuit Judge*.—The legal title is in Mr. Usher, who is in possession, and is a purchaser for value. There

Usher v. McBratney.

is no proof of any authority from the railway company to Stone to make the agreement of April 9, 1862, which is the sole basis of the title bond of December 15, 1862, or of McDowell to execute the title bond, but if such authority existed or is assumed, the paper of April 9, 1862, shows upon its face, and is also shown by the evidence, *aliunde*, to have been given for an illegal purpose, viz.: to suppress investigation and to influence the course of legislation.

The suit in the state court against the railway company is no estoppel as against the plaintiff. That was expressly decided by the supreme court of Kansas on the appeal in that case (*Kansas Pacific Railway Company v. Usher*, 10 Kansas, 415).

The defendant not being a stockholder in the railway company cannot set up that the Shoemaker & Co. contract was entered into by directors who had a personal interest in it, even if all the stockholders were not interested equally with the directors or did not ratify it by acquiescence or otherwise. As the plaintiff is in possession and as the title bond of the defendant is of record and the defendant asserts rights under it, the plaintiff is entitled to the relief he seeks against it and a decree accordingly may be entered.

DECREE ACCORDINGLY.

NOTE.—See *Trist v. Childs*, 21 Wall. 441; *Weed v. Black*, 7 Chicago Legal News, 124. The following is an extract from the brief of complainant's counsel on lobbying contracts:

I. "All contracts for a contingent compensation for obtaining legislation are void by the policy of the law.' GRIER, J. in *Marshall v. Baltimore & Ohio R. W.* 16 How. 366. See also *Clippinger v. Hepbaugh*, 5 W. & S. 315; *Wood v. McCann*, 6 Dana (Ky.), 366; *Ryan v. Reynolds*, 5 Wis. 200.

II. "A contract for a contingent compensation to use personal influence on legislators is void by the policy of the law.' GRIER, J. *Marshall v. Baltimore & Ohio*, *supra*. Same doctrine, *Clippinger v. Hepbaugh*, *supra*; *Rose v. Truax*, 21 Barb. 361; *Frost v. Belmont*, 6 Allen, 159. In *Rose v. Truax* it is said that an agreement in respect to lobby services, and in

Usher v. McBratney.

effect providing for the sale of an individual's personal influence to procure the passage of a private law by the legislature, is void, as being inconsistent with public policy, and will not support an action; and if the contract be an entire one, and it be void in part, it is void *in toto*.

III. "All agreements for pecuniary considerations to control the course of legislation are void as against the policy of the law." FIELD, J. in *Tool Company v. Norris*, 2 Wall. 45. See, also, *Pingry v. Washburn*, 1 Aik. 264; *Mills v. Mills*, 40 N. Y. 543; *Harris v. Roof's Exrs.* 10 Barb. 287. The position of attorneys for public and open advocacy of such measures before legislative committees, or other similar bodies sitting in a quasi judicial capacity, is distinguished in *Wood v. McCann*, *supra*; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bryan v. Reynolds*, 5 Wis. 200, and *Lyon v. Mitchell*, 36 N. Y. 235. HUNT, J. says: 'It is allowable to employ counsel to appear before a legislative committee, or before the legislature itself, to advocate or oppose a measure in which the individual has an interest, for an honest purpose, avowed to the body before which the appearance is made, and by the use of just argument and sound reasoning; this is lawful. Personal soliciting of legislators is not a lawful subject of contract.' In the later case of *Mills v. Mills*, much stronger and more sweeping language is used. The court said: 'It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to these results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character and fatal to public confidence in its action.'

IV. "Such agreements are void, although no improper influences were contemplated or used, and although part of the consideration was lawful." FIELD, J. in *Tool Company v. Norris*, 2 Wall. 45. Same principle, *Filson's Trustees v. Himes*, 5 Penn. 542; *Bryan v. Reynolds*, *supra*; *Rose v. Truax*, *supra*; *Mills v. Mills*, *supra*.

V. "Such agreements are not merely voidable, or capable of rescission, but are *mala in se*, absolutely void, and without effect. *Martin v. Wade*, 37 Cal. 168; *Rose v. Truax*, *supra*; *Hunter v. Nolf*, 71 Penn. 234.

VI. "All contracts for a pecuniary consideration for influencing a public officer in the discharge of his duty, are void. *Cook v. Shipman*, 51 Ill. 316; *Cowman v. Cofroth*, 59 Pa. 19; *Hatzfeld v. Gulden*, 7 W. & S. 152; *Fuller v. Dame*, 18 Pick. 472; *Filson's Trustees v. Himes*, *supra*; *Hunter v. Nolf*, *supra*; *Workman v. Campbell*, 46 Mo. 305. Case of brokers for sale is distinguished in *Lyon v. Mitchell*, 36 N. Y. 235, disproving *To l Company v. Norris*, on this point. But see the dissenting opinion of GROVER, J. at page 682 of same volume. *Winpenny v. French*, 18 O. S. 469." See, also, *U. P. R. R. Co. v. Durant*, *ante*, p. 343.

Thayer v. Montgomery County.

NATHANIEL THAYER v. MONTGOMERY COUNTY.

1. If the *bonds* to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defence to an action on the coupons that they are signed by only one of the county officers.
2. A declaration upon county bonds should show by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. This principle applied, and the declaration held sufficient.
3. Bridge bonds—construction of local statute respecting; Kansas Municipal Bond Registration Act construed; Kansas Municipal Bond Curative Act construed; election and conditions precedent to issue of bonds—see cases in note.

(Before MILLER, Circuit Justice.)

*County Bonds.—Power to Issue Coupons.—Mode of Signing.—
Sufficiency of Declaration.*

ACTION on coupons on county bonds. The bonds in suit are in the usual form, signed by the chairman of the board of county commissioners, attested by the clerk, and are under the seal of the county. They are payable to the "Leavenworth, Lawrence and Galveston Railroad Company, or bearer," and contain the following recital: "This bond is executed and issued under the provisions of and in conformity to the laws of the state of Kansas, and in pursuance of the vote of a majority of the electors of Montgomery county, of June 21, 1870."

The petition set out the bonds and coupons in suit in full, but did not contain any express averment of the purpose for which the county issued the bonds, and such purpose did not appear otherwise than on the face of the bonds. The coupons were signed only by the county clerk.

Demurrer to petition on three grounds:

1. That the county clerk had no authority to sign coupons.
2. That it does not appear that the vote was by the *qualified* electors of the county.

Thayer v. Montgomery County.

3. That the authority or power of the county to issue the bonds in suit is not averred, and does not appear on the face of the bonds.

N. T. Stevens, for the plaintiff.

Clark, Gamble, & Shannon, for the county.

MILLER, *Circuit Justice*, orally overruling the demurrer, said, in substance :

I. As to the first ground of demurrer. The bond itself being duly signed and sealed by the proper officers of the county, and the coupons being part of the bond, it is no defence to the coupons that they are not signed by the chairman of the board as well as by the clerk.

II. The omission in the recital of the bond of the word "qualified," in describing the electors is immaterial. The electors are the qualified electors.

III. The third ground of demurrer presents to my mind a more serious question. It is that an authorized, lawful purpose for which the bonds were issued should be alleged in the declaration or be recited in the bonds, which are made part thereof. This, I think, is a sound proposition. The power of counties to issue bonds is not inherent or general. They are authorized to issue bonds or negotiable paper, only for limited or specific objects or purposes, and hence it should appear by averment in the petition or by recital in the bonds that they were issued for one of these specified purposes.

I should have preferred that the petition here should have alleged that the bonds in suit were issued by the county in payment for stock subscribed by it in the railroad company, but I must pass upon the sufficiency of the petition as it stands. The petition sets out the bonds in full, and although my conviction is not strong and clear, yet, taking a somewhat liberal view of the bonds, I think it can be gathered

Thayer v. Montgomery County.

from them that they were issued under the statute of the state, by the county, to aid the corporation payee in the construction of its road. In this view, I incline to hold, though with some hesitation, that the petition is good.

JUDGMENT ACCORDINGLY.

NOTE.—The opinion of Mr. Justice MILLER in the above case, asserts a doctrine of general interest, and holds that there is no presumption in favor of the power to issue such securities, and that to constitute a good declaration it must appear on the face thereof, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. The importance of this principle is manifest, for if bonds issued by counties contain no recital, it would seem to follow that there would be no presumption in favor of their validity, and it would devolve on the holder, though he were such *bona fide*, and for value, to aver and show by evidence *aliunde*, that the bonds were issued for some purpose authorized by statute. This view has much to support it in one of the latest cases on the subject in the supreme court of the United States.—*Nashville v. Ray*, 19 Wall. 468; See *Kennard v. Cass Co. ante*.

We append as a note, other rulings of the circuit court for the District of Kansas, at the June term, 1874.

COLER v. WYANDOT COUNTY.

Bridge Bonds.—Local Statute.—Election.

ACTION on bridge bonds executed by the county, reciting that they were issued under the internal improvement act of 1866, as amended in 1871. Special plea that the bridge for which the bonds were issued cost more than \$1,000, and that the question of incurring the debt was not submitted to the voters at a *general* election, of which the plaintiff had notice. This plea was based upon section 13 of the act of 1867 in respect of bridges. It was urged in support of this plea that the act last mentioned was an implied repeal of the internal improvement act of 1866, as to bridges. But the court (MILLER and DILLON, JJ.) decided otherwise, holding that the bridge act of 1867 contemplated the case where bridges were to be paid for out of the county treasury, from the ordinary revenue, and that the internal improvement act of 1866, as amended in 1867 and 1871, contemplated the case of bridges to be paid for by the issue and sale of bonds, and that the vote under the last named act need not necessarily be at a *general* election, as the act provides that it may be at such time and place as the county commissioners may order.

Grant & Smith, for the plaintiff.

Wheat & Cook, for the county.

Thayer v. Montgomery County.

JANUARY v. JOHNSON COUNTY.

*(Before MILLER, Circuit Justice.)**Registration Act.—Municipal Securities.*

The act of the state of Kansas of March 2, 1872, providing for the registration of municipal and county bonds, is not a curative act in the sense that it takes away any valid defence which the city or county would otherwise have to bonds theretofore issued.

Grant & Smith, for the plaintiff.

Mr. Cobb, for the county.

THAYER v. JOHNSON COUNTY.

Election.—Condition Precedent.—Curative Act.

THE bonds in question were issued to the Kansas and Neosho Valley R. R. Co. or bearer, part dated in September, 1867, and the rest in June, 1868. There is no recital in the bond, except that it purports to be a "stock bond," and states that it is issued "by order of the board of commissioners of the county of Johnson." They are signed by the chairman of the board, attested by the clerk, and are under the seal of the county.

The present questions arose on demurrer to several special pleas in the answer. The general nature of these pleas appears in the opinion.

Pratt & Ferry, and *C. W. Blair*, for the plaintiff.

Cobb & Cook, for the defendant.

DILLON, *Circuit Judge*.—I am of the opinion that the second count of the answer is insufficient. It does not deny that the plaintiff is a holder of the bonds in suit for value without notice. Part of the bonds were issued after the curative act of February 25, 1868 (*Gen. Stats. of Kansas*, 1868, p. 892.) This act, it seems to me, validates the bonds thereafter issued as against the two objections urged against them, one of which is that the particular railroad company to which the subscription was to be made was not named in the order of submission, and the other, that the line of the road was not located through the county prior to the election. If the bonds issued in June, 1868, under the order and vote of 1865, are valid by reason of the curative act of February 25, 1868, I am inclined to think the bonds issued in 1867, under the same order and vote, are also made valid. But, however this may be, the plaintiff, as a presumed *bona fide* holder, may, under the doctrine of the supreme court of the United States, recover, as against the matters pleaded in the second

Gray v. Coffman.

count of the answer, no notice thereof to plaintiff being charged in this count.

The third count is like the second except that it charges notice to the plaintiff of the order of submission, and denies that the plaintiff is a holder for value. Under the statute under which the vote in question was taken the supreme court of the state has decided "that some corporation must be named [in the order for the vote] as the recipient of the subscription and bonds, or the proceeding will be without warrant of law and void." *Lewis v. Commissioners of Bourbon County*, 1 Cent. Law Jour. 16. As the plea in question alleges notice to the plaintiff of this order, it would, if this view be correct, and if the doctrine of the state supreme court were followed by this court, be a good defence. But as to the bonds issued since the curative act, and, as it seems to me, as to those issued before the same, they are validated by that act.

As the fourth plea does not charge notice to the plaintiff that the bonds were issued without any subscription having been made or stock received, it sets up no defence available against an innocent holder of the bonds for value.

The 6th and 7th pleas set up, the one the failure of consideration, and the other, the want of consideration, for the bonds in question, with notice to the plaintiffs. These constitute good defences.

The result is that the demurrer to the second, third and fourth counts of the answer is sustained—as to the sixth and seventh counts, overruled.

PAMELA GRAY v. JACOB COFFMAN.

1. The treaty of March 17th, 1842 (7 Stats. at Large, 608, sec. 14), and of January 31st, 1855 (10 *Ib.* 1159), between the United States and the Wyandot Indians in respect to the grant to members of the tribe, of a right to select and locate a section of land, construed.
2. The treaty of 1855 requires the patent to issue in the *name of the reservee*, though, if he be dead, the selection may be made by his "heirs or legal representatives," to be determined by the laws, usages and customs of the tribe. Whether a patent issued in the name of the heirs of the reservee is void, *quære?*
3. A will of the right to this "float" made and executed according to the laws of the tribe, and proved and allowed by the proper tribunal of the tribe, is valid and will be respected by the civil courts. See *Mackey v. Coxe*, 18 How. 100.

Gray v. Coffman.

4. Relation of the Wyandot Indians to the civil laws of the territory of Kansas, in respect to the disposition of property before and after the treaty of 1855, considered.

(Before DILLON, Circuit Judge.)

Wyandot Indians.—Construction of Treaty.—Indian Wills.—Devise of "Float."—Descent of Property.

THIS is an action of ejectment for lands situate in Lyon county, in the state of Kansas. The case was tried upon testimony submitted to the court, a jury having been waived. The evidence was voluminous, but the material facts sufficiently appear in the opinion of the court.

R. M. Ruggles, and *Clough & Wheat*, for the plaintiff.

Wilson Shannon, *W. P. Montgomery*, and *E. S. Waterbury*, for the defendant.

DILLON, *Circuit Judge*.—To determine the title to the land here in controversy involves the necessity of deciding several novel and highly interesting questions.

The plaintiff claims title under a patent dated the 3d day of May, 1861, reciting the treaties of 1842 and 1855, below mentioned, between the United States and the Wyandot nation of Indians, and which patent was issued to the heirs of John Hicks. John Hicks was a Wyandot Indian.

It is necessary briefly to refer to the history of the Wyandot tribe and of their removal to Kansas. In 1825 the Kansas Indians ceded, with the exception of a limited reservation, this country to the United States. 7 Stats. at Large, 244. In 1830 congress adopted the policy of causing Indian tribes residing east of the Mississippi to be removed to specified reservations west of the Missouri. 4 Stats. at Large, 411. The Wyandot Indians were the last tribe in Ohio which ceded their reservation in that state to the United States. This was done in 1842 by the treaty of Upper Sandusky, of March 17th of that year. 7 Stats. at Large,

Gray v. Coffman.

608. By the 14th section of that treaty, the United States agree to grant to the above named John Hicks, to his heirs, and to thirty-five other specified persons of the Wyandot nation, one section of land each: "The land hereby granted is to be selected by the grantees, surveyed and patented at the expense of the United States, but never to be *conveyed* by them or their heirs without the permission of the president of the United States."

The next year, 1843, the Wyandot Indians, including John Hicks, removed to their reservation in Kansas. Here he lived with the tribe until 1853, when he died. On the 10th day of January, 1853, a short time before his death, he made his last will in writing. It was drawn up with all the usual formalities of such instruments, by Governor William Walker, an educated Wyandot Indian, attested by him and signed by the testator. The third clause of this will is in these words: "I will and bequeath unto my sons, Francis A. Hicks, and John Hicks, jr. the section of land granted to me by the treaty of Upper Sandusky, dated March 17th, 1842." This instrument is produced and bears upon it this endorsement: "The within will and testament was read in open court, and allowed probate and ordered recorded. Wyandot council, February 16th, 1853."

"JOHN D. BROWN, Principal Chief.

"JOEL WALKER, clerk, *pro tem.*"

It is indisputably established by evidence *aliunde* that the will was presented to the Wyandot council at that date, and was regularly allowed by it as the will of John Hicks, sr.

These devisees, John Hicks, jr. and Francis A. Hicks, were the only living children of John, sr. but there were then living grandchildren by two of his deceased children.

On the 31st day of January, 1855 (10 Stats. at Large, 1159), another treaty was made with the Wyandot Indians, which was ratified March 1st of that year. The first article

Gray v. Coffman.

states that "The Wyandot Indians having become sufficiently advanced in civilization, and desirous of becoming citizens, it is hereby agreed and stipulated that their organization and their relations to the United States as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification the said Wyandot Indians, and each and every one of them, except as hereafter provided, shall be deemed, and are hereby declared to be, citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such citizens and shall in all respects be subject to the laws of the United States and the territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States and of said territory shall be extended over the Wyandot country in the same manner as over other parts of said territory." Then follows a declaration excepting, for the time, from the above provision as to citizenship, such Indians as may apply for it.

The treaty makes provision for the survey, platting and partition of their reservation, and for lists of the members of the tribe, divided into three classes: 1st, of those who are able to control and manage their affairs and interests. 2d, those who are not. 3d, orphans, idiots and insane persons. Lists of the second and third classes were to be furnished by the Wyandot council, under whose supervision and guardianship the treaty continues them.

The eighth article of the treaty defines the persons entitled to money and lands thereunder "to be such only as are actual members of the Wyandot nation, *their heirs and representatives*, and as are entitled to share in the property and funds of the said nation, *according to the laws, usages and customs thereof.*"

Gray v. Coffman.

Article 9, which is important, is in these words. "Each of the individuals to whom reservations are granted by the 14th article of the treaty of March 17, 1842 (of Upper Sandusky), or *their heirs or legal representatives*, shall be permitted to select and locate said reservations, on any government land west of Missouri and Iowa subject to pre-emption and settlement; said reservations to be *patented* by the United States *in the names of the reservees*; and the reservees, *their heirs and proper representatives*, shall have the unrestricted right to sell and convey the same; but in cases where any of the said reservees may not be sufficiently prudent and competent to manage their affairs in a proper manner, which shall be determined by the Wyandot council, or where any of them have died, leaving minor heirs, the said council shall appoint proper and discreet persons to act for such incompetent persons and minor heirs in the sale of the reservations, and the custody and management of the proceeds thereof; the persons so appointed to have full authority to sell and dispose of the reservations, and to make and execute a good and valid title thereto."

On the 30th day of May, 1854—the year preceding this treaty—congress passed the act organizing the territory of Kansas, but previous to this the public lands therein had been thrown open to pre-emption and settlement, and these Wyandot "floats," by which 640 acres could be secured for town sites, instead of 320 acres, were in great request. Francis A. Hicks, one of the devisees of the John Hicks "float," died August 16, 1855, a few months after the treaty of that year, leaving children and grand-children. He made a will on the 7th day of August, 1855, and therein directs "the one-half of the section of land willed to him by his father, under the treaty of March 17, 1842, to be sold, and the avails thereof to be applied to the liquidation of his debts and liabilities," and appoints Joel Walker his executor.

Gray v. Coffman.

Now at the date of the death of Francis A. Hicks, on the 16th day of August, 1855, no statute of descents or will had yet been passed by the territorial legislature of Kansas. The council still continued to act, and the will of Francis A. Hicks was admitted to probate September 25, 1855, the executor gave bond, and was authorized by the council to act as such. Subsequently, to-wit, January 5, 1863, the will was presented to the regular probate court of Wyandot, county, and proved and allowed, but without any notice being published or otherwise given, so far as appears of record. Joel Walker, the executor of Francis A. Hicks, pursuant to directions in his will, sold the testator's undivided half of his 640 acre "float" to Jacob Ulrich for \$1,000, and reduced the contract to writing. Ulrich located the float on the land in question, which was approved, and the patent issued, as above mentioned, May 3, 1861, "*to the heirs of John Hicks,*" sr. Subsequently, conveyance was made to Ulrich's estate, for this interest, and the heirs of Ulrich conveyed the land in question to the defendant.

The plaintiff claims a title through conveyance from grandchildren of John Hicks, sr. who, if his will and the will of Francis A. Hicks are valid, had no title. In other words, the right of the plaintiff to recover is based upon the proposition that these two wills are nullities; that, though made, executed and probated according to the laws, customs and usages of the Wyandot nation of Indians, to which they belonged, these instruments have, in law, no legal effect in determining the rights of the parties.

The Wyandot Indians, before their removal from Ohio had adopted a written constitution and laws, and among others, laws relating to descent and wills. These are in the record, and are shown to have been copied from the laws of Ohio, and adopted by the Wyandot tribe, with certain modifications, to adapt them to their customs and usages. One of these modifications was that only living children

Gray v. Coffman.

should inherit, excluding the children of deceased children, or grand children. The Wyandot council, which is several times referred to in the treaty of 1855, was an executive and judicial body, and had power, under the laws and usages of the nation, to receive proof of wills, etc.; and this body continued to act, at least to some extent, after the treaty of 1855.

The first question arises under the patent. The treaty of 1855 required the patent to be issued in the *name of the reservee*. The patent of May 3, 1861, was in fact issued not to John Hicks, the reservee, but to the *heirs of John Hicks*. If it had been issued in the name of John Hicks, though he was then dead, it would, under the act of 1836, have insured to his heirs, devisees, or assignees (5 Stats. at Large, 81). What is the effect of its being issued as it was to the heirs of John Hicks? The plaintiff contends that the patent was rightfully issued, and that under it the heirs of John Hicks take by *purchase*. That to ascertain who are his heirs, resort must be had, not to Indian laws, but to the laws of Kansas at the time, and that the legal effect of the patent is the same as if the children or heirs of John Hicks, sr. had been named therein, which, if true, would cut off the rights of the creditors, devisees or assignees of John Hicks, sr.

On the other hand the defendant insists, inasmuch as it is true, that if the patent is valid, the heirs of John Hicks take by purchase, that the patent is void because it was not issued, as the treaty specifically required, in the name of the reservee.

The issuing of a patent is a ministerial act, and a patent issued without authority is void. I am inclined to think that the departure of the patent in respect to the name of the grantee from the requirements of the treaty is material, and that the patent is therefore a nullity. The effect of this would be that the legal title is still in the United States, and, of course, the plaintiff could not recover in ejectment.

Gray v. Coffman.

But this point I leave undetermined, preferring to rest my judgment upon the ground that under the circumstances, the court must give effect to the well established laws, customs, and usages of the Wyandot tribe of Indians in respect to the disposition of property by descent and will. John Hicks, sr. had a valuable right given by the treaty of 1842—a right to select and locate 640 acres of land—not land but “a float,” or right to land. He died in 1853, within the limits of what afterwards became the territory of Kansas. There is no national law of descent and wills, none regulating the rights of members of Indian tribes. The treaty of 1855 recognizes and provides in several places for the rights of *heirs or legal representatives* of the reservees under the treaty of 1842. These must mean heirs and legal representatives “according to the laws, usages and customs” of the tribe. See articles 8 and 9 of the treaty of 1855.

The government was aware that between 1842, when the right was given, and 1855, when the second treaty was made, that some of the reservees had died, and it provided carefully for this contingency by authorizing their *heirs or legal representatives* to select and locate the section of land. It is hardly possible to suppose that congress meant to refer to the law of Missouri territory of 1815, to ascertain who were the heirs or legal representatives of the deceased reservees. There is but one way to determine this, and that is by the laws, customs and usages of the tribe. If this is so, then the will of John Hicks, sr. made and allowed in 1853, was valid and gave the right to his sons, John, jr. and Francis A. If the will of the elder Hicks is valid, so likewise is the will of Francis A. whose death occurred previous to the enactment of any statute of wills or descents in Kansas, but after the ratification of the treaty of 1855. The dates are as follows: The treaty was ratified March 1st, 1855; Francis A. Hicks died August 16, 1855; the

Gray v. Coffman.

territorial statute of Kansas concerning wills was approved August 30, 1855 (Laws of Kansas, 1855, p. 753, 761). The will of Francis A. Hicks was admitted to probate by the Wyandot council Sept. 25, 1855. If the foregoing views are correct, the will of Francis A. Hicks was valid when he died, because it conformed to the laws and usages of his tribe, and there were no laws either of the United States or the territory of Kansas upon the subject.

Passing the question whether it is necessary to valid action by an executor under a will, that his appointment should be ratified by some court with probate powers, the only remaining inquiry would be, must Indian wills, after the ratification of the treaty of 1855, be presented to and allowed by the civil tribunals, before acts done thereunder and authorized thereby can be treated as valid?

Notwithstanding the broad language of the first article of the treaty of 1855 as to the dissolution of the tribal relation of the Wyandot Indians, and as to their becoming citizens of the United States and subject to its laws and the laws (prospective) of the territory of Kansas, it is evident from a view of the whole treaty that their property rights were regulated by it, and that the Wyandot council, which was a tribunal with executive and judicial functions, was still to continue in force, at least for a time.

Francis A. Hicks died, leaving a will made and executed in due form, according to the laws of the tribe, before there were any laws of Kansas on the subject of the descent of property or of wills. The Wyandot council with jurisdiction over wills, continued to act. Wills which would be formal and valid by the laws or usages of the tribe, might be, and probably would be, informal when tested by territorial laws subsequently enacted. The foregoing views find strong if not, indeed, full support in the case of *Mackey v. Coxe*, 18 How. 100.

I am of opinion, therefore, that both wills are valid, and

January v. Johnson County.

that the plaintiff, whose case rests upon the hypothesis of their nullity has no title to the land in controversy. Accordingly, there will be a judgment for the defendant.

JUDGMENT FOR DEFENDANT.

NOTE.—See *Hicks v. Buttrick*, *post* ; and *Mungosah v. Steinbrook*, *post*.

D. A. JANUARY v. JOHNSON COUNTY.

The act of the Kansas legislature approved March 9th, 1874 (Laws 1874, p. 45, sec. 7), was intended to change the mode of levying and collecting taxes to pay municipal bonds and not to validate or make binding upon municipalities bonds which would otherwise be void.

(Before DILLON, Circuit Judge.)

Municipal Bonds.—Statute as to Levying Taxes to pay Such Bonds Construed.

ACTION on county bonds issued in aid of a railroad company. Answer, setting up a sufficient defence as against the company and alleging *notice* thereof to the plaintiff. On demurrer to the answer it was contended by the plaintiff that the bonds in suit had been *validated* by section 7 of chap. 39 of the Laws of Kansas, approved March 9th, 1874, (Laws 1874, p. 45), amendatory of chap. 68 of the laws of 1872.

The language of section 7 is as follows: "It shall be the duty of the proper officers of any county, city or township, in which bonds have been heretofore issued, for any of the purposes mentioned in the act to which this is amendatory, annually, at the time when other taxes are levied, to levy and cause to be collected a sufficient tax to pay the interest on all such bonds as the same shall become due, and also for

Savings Bank v. Parmelee.

the purpose of creating a sinking fund for the final redemption of such bonds."

Grant & Smith, for the plaintiff.

Cobb & Cook, for the county.

DILLON, *Circuit Judge*.—As the act in which this section is found does not profess in its title or body to be a curative act, and as when comparing this act with the act of 1872 which it amended, it appears to have been the purpose of section 7 to change the mode of levying and collecting the taxes, it is my opinion that it was not intended to have, and does not have, the effect to make binding upon the county, bonds which would otherwise be void.

DEMURRER OVERRULED.

NOTE.—See *Thayer v. Montgomery County*, *ante*, and cases there stated in note.

WEST ST. LOUIS SAVINGS BANK v. SHAWNEE COUNTY BANK
and G. F. PARMELEE.

A cashier without special authority cannot bind his bank by an *official* endorsement of his individual note, and the *onus* is on the payee to show the cashier's authority.

(Before DILLON and FOSTER, JJ.)

Accommodation Endorsement by Cashier.

THE defendant, Parmelee, made his *individual note payable to the order of the plaintiff*, and endorsed it, "G. F. Parmelee, cashier," and gave the plaintiff as collateral security a certificate of stock in the Shawnee county bank, issued to and owned by him (Parmelee). The consideration of the note was a loan of money by the plaintiff to Parmelee, who, at the

Savings Bank v. Parmelee.

time of obtaining the loan advised the plaintiff that he intended to use the money borrowed to pay for the stock he had subscribed for in the Shawnee county bank.

The defendant, Parmelee, has failed to pay the note, and the question in the case is whether the Shawnee county bank is liable on the indorsement of the cashier above mentioned.

Ennis & Foster, for the plaintiff.

Guthrie & Brown, for the Shawnee county bank.

DILLON, *Circuit Judge*.—The form of the note as well as the evidence *aliunde* shows that the plaintiff made the loan to the defendant, Parmelee, who gave his own note for the amount and pledged his own stock as security. The note was indorsed by him thus: "G. F. Parmelee, cashier." It is established by the proofs that the directors of the defendant bank did not know of this indorsement and never ratified it.

The defendant bank did not receive the proceeds of the discount of the note of Parmelee except in payment of his stock. Under these circumstances we are clear in the opinion that Mr. Parmelee's indorsement of the note as cashier of the defendant bank did not bind it. The plaintiff had notice of the presumptive want of authority of Parmelee, both by the form of the instrument (*Lemoine v. Bank of North America, ante*, p. 44, and cases there cited), and the facts of the transaction of the loan to him. The cashier of a bank has no implied authority to *indorse officially* his individual note, thus by his own act making the bank an accommodation indorser for his own benefit. As this was done in this instance, the plaintiff bank had notice of it, and to hold the defendant bank on such indorsement the *onus* to show authority, express or implied, from the directors of the defendant bank, is upon the plaintiff. It has failed to establish

Savings Bank v. Parmelee.

such authority. On the other hand, the defendant bank has affirmatively established that the cashier had no such authority. The suit must be dismissed as to the defendant bank. The plaintiff is entitled to a decree against the defendant, Parmelee, for the amount of the note and for a sale of the collateral.

FOSTER, J. concurs.

DECREE ACCORDINGLY.

NOTE.—*Notice to director when notice to the bank.*—The leading cases on this subject are collected and well commented on in Morse on Banks and Banking, 108 *et seq.* where the author expresses the rule (*Ib.* p. 111), in this language: "Whatever knowledge a director acquires *within the scope of his official employment*, he is bound to communicate to his co-directors, that is to say, to the bank itself."

The case of the *Bank of the United States v. Davis*, 2 Hill (N. Y.), 451, is one in which a bill of exchange was sent to a bank director with the request to procure a discount upon it. This director, at the director's meeting in which he participated, falsely asserted that the discount was for himself, and he received the proceeds of it, and it was held that the bank was affected through the director with knowledge and could not recover the amount of the bill from the party defrauded.

Knowledge possessed by a director, who was also one of the trustees of bonds assigned to an innocent third person, does not charge the latter with the knowledge of the director who only nominally represents them. *Curtis v. Leavitt*, 15 N. Y. 9.

When notice to the president is notice to the bank, see *Porter v. Bank of Rutland*, 19 Verm. 410.

"Corporations having common officials are not," says Mr. Brice in his treatise on *Ultra Vires*, 350 (Eng. ed.), "necessarily affected through these with a knowledge of each other's transactions." He cites *Re Marseilles Railway Co. etc. Law Rep.* 7 Ch. 161; *Re European Bank, Law Rep.* 5 Ch. 850; *Compare Re Contract Corp. etc. Law Rep.* 8 Ex. 14; *Gray v. Lewis*, 1 b. 520.

Williams v. Ritchey.

VICTORIA E. WILLIAMS, by her next friend, v. JOHN RITCHEY.

The circuit court of the United States has jurisdiction of a suit in chancery commenced on behalf of an infant who is a citizen of another state against a citizen of the state where the suit is brought, although the next friend of the infant complainant be a citizen of the same state with the defendant.

(Before DILLON, Circuit Judge.)

Jurisdiction.—Chancery.—Infant Complainant.—Residence of Prochein Amy.

THE bill of complaint commences thus: "Victoria E. Williams, a citizen of the state of New York, and an infant under the age of eighteen years, by her next friend, Jacob V. Adneire, brings this her bill against John Ritchey, a citizen of the state of Kansas, and thereupon your oratrix complains," etc. Demurrer by the defendant on the ground that the *prochein amy* is not stated in the bill to be a citizen of a state other than the state of Kansas; and counsel admit that in point of fact he is a citizen of Kansas.

Clemens & Freiderich, for the plaintiff.

John Martin, for the defendant.

DILLON, *Circuit Judge*.—The point here presented is stated by counsel to be novel, but it does not appear to the court to be difficult of solution. If the *prochein amy* is to be considered as the *party*, or even a party to the suit the objection to the jurisdiction of the court would be well taken. But he is not a party. The complainant is the infant in whose name and on whose behalf the bill is exhibited by her next friend. Infants are capable of maintaining suits to assert their rights, but the practice in chancery requires that the suit of an infant should be supported by another person technically known as the next friend of the infant.

The object of this requirement is that the court may have

Williams v. Ritchey.

the guaranty of a responsible person that the suit is one proper to be brought and that it is brought in good faith with the sanction of a friend of the infant who is willing to assure this by assuming a liability to the defendant for costs if the suit should prove unsuccessful. But this does not make the *prochein amy* in a legal sense the party or a party to the suit. The suit is, nevertheless, the suit of the infant. This is apparent from several considerations. Thus if the infant dies the suit abates, but not so on the death of the *prochein amy*. In this last event the court on application will appoint a new *prochein amy* and the cause proceeds. Nor does the suit abate on the infant's coming of age; he may then elect whether the cause shall go forward or not. If he goes on, no amendment or change in the bill is necessary. The *prochein amy* having served the temporary purpose for which he supported the bill, drops out of the cause and all future proceedings are conducted without the use of his name. If the infant on attaining his majority abandons the cause, as he may do, he must as between himself and his next friend pay the costs unless the bill was improperly filed. The next friend may be any person willing to act, even one it seems who has been outlawed, and he is subject to removal by the court for cause, and is at all times under its control. (1 Daniell Chan. Prac. 92, *et seq.*)

A person sustaining such a relation to the cause is not a party in the sense of the 11th section of the judiciary act which requires the adverse parties to be citizens of different states in order to give this court jurisdiction. Indeed, as one of the objects of the practice in chancery requiring a suit by an infant to be brought by his next friend is to give the defendant a right to recover his costs, for which the infant is not liable, it is manifestly to the advantage of the defendant that the next friend should be a citizen of the same state as the defendant, thus rendering his property subject to the process of the court.

DEMURRER OVERRULED.

Terry v. Insurance Company.

JAMES E. TERRY v. THE IMPERIAL FIRE INSURANCE COMPANY.

A corporation created by the laws of Great Britain is an "alien" within the meaning of section 12 of the judiciary act of 1789 (1 Stats. at Large, 79), and when sued by a citizen of the United States in the state court, may, on complying with the requirements of that section, have the suit removed to the proper circuit court of the United States.

(Before FOSTER, J.)

Foreign Corporation.—Removal of Suit by Such Corporation from State to Federal Court.

THE plaintiff, Jas. E. Terry, a citizen of the state of Connecticut, commenced his suit in the district court of Douglass county against said defendant, the Imperial Fire Insurance Company, to recover for a loss by fire, upon a policy of insurance issued by that company.

The defendant, on entering its appearance, filed a petition for a removal of the case to this court, under the provisions of the 12th section of the judiciary act of 1789, claiming that it is within the meaning of that section an "alien." On that petition the case was sent to this court. Now the plaintiff files his motion to remand the cause to the state court. The Imperial Fire Insurance Company of London is a corporate body, organized under and by virtue of the laws of Great Britain.

Thatcher & Stephens, for the plaintiff.

Nevison, Simpson & Alford, and *S. A. Riggs*, for the defendant.

FOSTER, J.—The only question presented to this court for determination is, whether or not the defendant is an *alien* within the meaning of the constitution, and the judiciary act. It is a question of no little moment, and one upon which there appears to be no reported cases, directly in

Terry v. Insurance Company.

point; its solution however, is not difficult, in the light of the several decisions of the supreme court, establishing the right of corporate bodies of other states to litigate in the federal courts, as if citizens of such other states.

Perhaps there is no one subject in the litigation in the highest court of the land, which has given rise to so much controversy, and which has brought out more able expressions of opinion from the bench and the profession, than the question whether or not corporations come within the jurisdictional rights given to citizens of different states, to sue and be sued in the United States courts. But however interesting that discussion may be to the legal student, or however weighty may be the arguments and reasons urged against the conclusion to which the federal courts have finally arrived, it may now be regarded no longer an open question, and we are bound by the maxim, *stare decisis et non quieta movere*.

The reasoning upon which those decisions rest, applies with equal force to the question involved in this case, and is decisive of it.

It has been repeatedly decided that a body corporate, organized under the laws of a state, is to be treated as a citizen of that state, so far as the question of jurisdiction of this court is concerned.

In other words, when a corporation is created by the laws of a state, the legal presumption is that its members are citizens of that state, and that a suit by or against a corporation in its corporate name, must be conclusively presumed to be a suit by or against citizens of the state which created the corporate body. (*The Louisville, Cincinnati & Charleston Railroad Company v. Letson*, 2 How. 497; *Marshall v. The Baltimore & Ohio Railroad Co.* 13 How. 314; *The Covington Drawbridge Company v. Shepherd, et al.* 20 How. 232; *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 286; *Railway Company v. Whitton's Administrator*, 18 Wall. 270.)

Terry v. Insurance Company.

If, then, it is conclusively presumed that the members of a corporation created by the laws of a state of this Union are citizens of that state, it follows that the members of a corporation created within the sovereignty of Great Britain, and under the laws of that country, are presumed to be citizens or subjects of that kingdom.

In the case of the *Bank of Augusta v. Earle*, 13 Pet. 585, it was decided that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only by force of the law. It must dwell in the place of its creation, and cannot migrate to another sovereignty; yet, it does not follow that its existence will not be recognized in other places, or that it may not have the power of contracting in other states, under the comity between states and nations. On the contrary, that power is therein distinctly affirmed.

In the case of the *Bank of the United States v. Devaux*, 5 Cranch, 61, Mr. Chief Justice MARSHALL, speaking of the apprehensions of suitors as to the local influence of the state courts, classes aliens and citizens together as coming within the rule, and says: "Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name indeed cannot be an alien or a citizen, but the persons that it represents may be the one or the other."
* * * Substantially and essentially the parties in such a case, when the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals." Although that case has been modified by later decisions on other points, the rule therein established, classing aliens of foreign corporations with citizens of domestic corporations, has not been questioned.

Terry v. Insurance Company.

In the *Louisville Railroad Co. v. Letson*, the court, after speaking of the case in 5 Cranch, say: "Let it then be admitted for the purpose of this branch of the argument, that jurisdiction attaches in cases of corporations in consequence of the citizenship of their members, and *that foreign corporations may sue when the members are aliens*, does it necessarily follow, because the citizenship and residence of the members give jurisdiction in a suit at the instance of a plaintiff of another state, that all of the corporators must be citizens of the state in which the suit is brought?" And the court then holds that the members of the corporation must be presumed to be citizens of the state in which the corporation was created and domiciled. The court rest their decision on this broad ground, and say: "A corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person."

Resting upon the analogy of these decisions, we hold in this case that the members of this Insurance Company defendant must be presumed to be subjects of Great Britain, and as such entitled to bring their case to this court.

Motion to remand overruled.

ORDERED ACCORDINGLY.

NOTE.—"Where the members of a corporation are aliens * * * they come within the meaning and terms of the jurisdiction of the federal courts." "Incorporated aliens * * * may sue a citizen in the federal courts by their corporate name, and the controversy is substantially between aliens and a citizen." 1 Kent's Com. 348. See also Angell & Ames on Corporations, secs. 377, 378, and 1 Abbott's U. S. Practice, 216. *Fisk v. Ch. de. Railroad Co.* 53 Barb. 472; (3 Abb. N. Y. Rep. N. S. 458). *King of Spain v. Oliver*, 2 Washington, C. C. 429.

Farmers, &c. Trust Company v. St. Jo. &c. Railway Company.

FARMERS LOAN & TRUST COMPANY v. ST. JO. & DENVER
CITY RAILWAY COMPANY, *et al.*

1. Rolling stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly recorded as a mortgage of realty, need not be recorded also as a chattel mortgage.
2. But a different principle applies to coal, oil, and such personal property as may be used, or is commonly used, for other than railway purposes. Such property would be subject to execution if not held by a mortgage thereof, duly executed and recorded.

(Before MILLER and DILLON, JJ.)

Railway Mortgage.—Rolling Stock.—Whether Realty or Personality.

BILL to foreclose. The plaintiffs are trustees in a railway mortgage executed by the defendant company to secure bonds. The mortgage covers, *inter alia*, "the rolling stock and other property appertaining to said railroad." It was duly recorded as a real estate mortgage, but not as a chattel mortgage, as the latter, to be valid, are required to be recorded by the laws of Kansas (Genl. Stats. p. 584, sec. 9, *et seq.*). Certain judgment creditors of the mortgagor levied upon the rolling stock embraced in the mortgage; and the question was whether their rights were prior to those of the plaintiffs. This was fully argued before MILLER and DILLON, JJ.

Ashbell Green and John Doniphan, for the plaintiffs.

Nathan Price and W. D. B. Motter, for the judgment creditors.

MILLER, *Circuit Justice*.—After having taken time to consider the question involved in this case, my judgment is that it was not necessary, as to the rolling stock, to record the instrument as a chattel mortgage. As to this it is sufficient

Hicks v. Butrick.

even as to creditors, that the mortgage was duly registered as a mortgage of real estate. In my opinion rolling stock and other property strictly and properly appurtenant to the road, is part of the road and covered by the mortgage in question, which in terms embraces rolling stock. The cases are conflicting upon the point as to the *nature of rolling stock*, but considering the peculiar character of a railroad, the true principle is the one above stated. Under the provisions of this mortgage a different principle would apply to fuel or other property personal in its nature and which is used, or is such as is commonly used, for other than railway purposes. Such property would be subject to the levy and not be held by the mortgage.

DILLON, *Circuit Judge*, concurs.

JUDGMENT ACCORDINGLY.

MATILDA HICKS v. HIRAM BUTRICK.

By terms of the treaty of January 31st, 1855 (10 Stats. at Large, 1159) between the United States and the Wyandot tribe of Indians, viewed in the light of the practical construction which it has received and of the patents to lands issued thereunder to the competent heads of families: *Held*, that such patents conveyed to the head of the family the land in fee and not in trust for the wife and other members of his family; approving *Summers v. Spybuck*, 1 Kansas, 394.

(Before DILLON, *Circuit Judge*.)

*Wyandot Treaty.—Lands Patented to Heads of Families.—
Nature of Title Granted.*

The Wyandot Indians, formerly numerous and powerful, while the French and English were contending for the domination of the continent, emigrated from their homes in Canada, crossed the Detroit river into Michigan, fought their way against all opposing forces along the southern shore

Hicks v. Butrick.

of lake Erie, and finally became permanently located under the protection of the United States in northern Ohio. On January 21st, 1785, the United States, by treaty of that date, conceded to the Delawares and Wyandots a large tract of territory, embracing millions of acres, in northern Ohio. Of these lands, on the 17th of March, 1842, there remained to the Wyandots, in the county of Crawford, 109,144 acres, which, by treaty of that date, were ceded to the United States. In the mean time (near 60 years), the Wyandots made rapid progress in civilization, but had decreased in numbers and wealth.

The title of the Wyandot Indians to the lands in question was derived as follows :

By treaty of September 24th, 1829 (7 Stats. at Large, 327), it is provided that the country selected in the fork of the Kansas and Missouri rivers (in which are the lands in question) "*shall be conveyed and forever secured by the United States to the said Delaware nation as their permanent residence.*" By article 2 of the compact between the Delaware and Wyandot nations, December 14th, 1848, the Delawares did "*cede, grant and quit claim to the Wyandot nation thirty-six sections of land,*" in which thirty-six sections are the lands in controversy. This contract was confirmed by act of congress, approved July 25th, 1848 (Stats. at Large, vol. 9, 336), with the proviso that the Wyandot nation shall take no better right or interest in the lands than was then vested in the Delawares. The Wyandot nation, by this act of congress, had secured to it the right to possess, occupy and reside upon these thirty-six sections of land.

Within seven years was concluded the treaty of January 31st, 1855 (10 Stats. at Large, 1159) under which the present controversy arises, which requires a construction of some of its provisions.

John Hicks was a member of the Wyandot tribe in January 31st, 1855, and had a wife and five children, of whom

Hicks v. Butrick.

the complainant is one, and who was then about eleven years of age. In the allotment of lands under the treaty of 1855 John Hicks and family were entitled to 257 acres, of which the complainant claims by the present bill to be entitled to an *undivided one-seventh part*.

The case was submitted upon bill and answer.

It appears by the pleadings, that John Hicks, the competent head of a family, under the treaty between the United States and the Wyandot nation, of the 31st of January, 1855, received, on the 1st day of June, 1859, a patent to 257 acres of lands assigned to him and for his family under said treaty, including the lands in suit, reciting that said land had been allotted to John Hicks, the head of the family, naming his wife and five children, and conveying the same "unto the said John Hicks, as the head of the family aforesaid, and to his heirs and assigns forever, as an absolute and unconditional grant, in fee simple, to have and to hold the said tract or parcel of land, with the appurtenances, unto the said John Hicks, as the head of the family aforesaid, and to his heirs and assigns forever."

Through divers mesne conveyances, the defendant has acquired the title of John Hicks to the lands in question. The commissioner of Indian affairs had directed the commissioners under the treaty to assign the land to the *heads of families*, and all the lands of families with a competent head were conveyed to the heads in the same manner as those conveyed to John Hicks.

The Wyandot nation, knowing of such construction, never dissented therefrom. The supreme court of the state of Kansas, in the month of September, 1863, gave the same construction to the treaty (see 1 Kansas reports, 394), and the defendant purchased on the 20th day of April, 1865, for a full consideration, paid without notice of any adverse claim, relying on such construction, and believing he was getting a good title, made improvements, and has ever since resided thereon.

Hicks v. Butrick.

On the 13th day of January, 1864, John Hicks and his wife conveyed said land thus assigned and patented to John Hicks as the head of a family to a person under whom the defendant claims. The theory of this bill is that John Hicks, by the patent acquired the title to the land in trust as to one undivided seventh part for the complainant, one of his children, and that she is entitled to have this trust enforced against the grantee of her father. The prayer is that the complainant's right be declared and established and that partition be made.

J. P. Usher and L. C. Slavens, for the complainant.

Cobb and Shannon, for the defendant.

DILLON, *Circuit Judge*.—The patent issued by the United States recites the treaty of January 31, 1855, that John Hicks was a member of the competent class, that the 257 acres of land were allotted, under the treaty, "to John Hicks, the head of a family consisting of [here naming his wife and five children, of whom the complainant is one]," and concluding as follows: "*Now, know ye: That, the United States of America * * by these presents do give and grant the tracts of land above described unto the said John Hicks as the head of the family as aforesaid—to have and to hold the said tracts of land unto the said John Hicks, as the head of the family as aforesaid, and to his heirs and assigns forever.*"

In executing the treaty of 1855, the United States construed it as dividing the competent Indians into two classes, to-wit: 1st, individuals or persons without families. 2d, heads of families, the names of the members of each separate family being arranged together. The test of competency in the head of the family was, sufficient intelligence and prudence, on the part of the head, to control and manage the affairs and interest of the family. (Art. 3.) By the

Hicks v. Butrick.

treaty lands were to be assigned and distributed "among all the individuals and *members* of the Wyandot tribe, so that those [lands] assigned to or *for* each shall, as nearly as possible, be equal in quantity or value, irrespective of improvements thereon; and the division and assignment of lands shall be so made as to include the houses, and, as far as practicable, the other improvements of each person or *family* * * and include those for each separate *family* all together." The commissioners are required to make a plat and schedule "showing the lands assigned to each *family* or individual."

Taking all the provisions of the treaty together, it quite satisfactorily appears to my mind that it contemplates that the competent heads of families shall take the lands by patent directly from the United States, and that the commissioner of Indian affairs and the land department properly construed the treaty, in investing John Hicks as the head of the family with the legal title to the land. It can hardly be supposed that the father of the family in his life time had no more interest in the land and the improvements than his wife or any one of his children, however young; or, as applied to the present case, that John Hicks, the father, who made the improvements, had only an undivided one-seventh part of the property.

Considering the known authority and power of the head of the family according to the laws, usages and customs of the nation, and the injustice of such a division, putting an infant child upon an equal footing with the father, I am of opinion that the theory upon which this bill is exhibited is unsound. Certain it is that the construction of the treaty was against the view maintained by the complainant; that this construction was acquiesced in both by the government and the Wyandot nation; that in 1863 the precise question here made was decided by the supreme court of Kansas (*Summers v. Spybuck*, 1 Kansas, 394), against the principle on

Mungosah v. Steinbrook.

which the bill in this case is founded, and that this view has since that time been accepted and acted upon by purchasers of these lands as sound and unquestioned law.

The practical construction of the treaty and the co-incidental judicial construction of it by the supreme court of Kansas, find much support in *Wilson v. Wall*, 6 Wallace, 83. And see 9 Stats. at Large, 203, as to payments to heads of Indian families: At all events my judgment is that the practical construction of the treaty, so long acquiesced in, and on the strength of which so much money has been invested in good faith, should not be overturned in favor of a new construction, which to say the least is attended with grave doubts and would result in unsettling so many titles.

BILL DISMISSED.

NOTE.—See *Gray v. Coffman*, ante; and *Mungosah v. Steinbrook*, post.

JAMES MUNGOSAH v. DANIEL STEINBROOK.

1. The laws of the state of Kansas have no application to the mode of alienation of lands granted to the Miami Indians (10 Stats. at Large, 1098; 11 *Id.* 430), so long as the title remains in the patentees.
2. The case of the Kansas Indians (5 Wall. 737) applied.

(Before DILLON and FOSTER, JJ.)

Indian Lands in Kansas.—Mode of Conveyance.

EJECTMENT. Plaintiff claims the title under a patent dated November 1st, 1859, issued to him in his Indian name as a member of the Miami tribe of Indians. The patent recites the 2d article of the treaty with the Miamis of June 5th, 1854 (10 Stats. at Large, 1093), and contains the condition prescribed by the secretary of the interior under section 11 of the act of March 3d, 1859 (11 Stats. at Large, 430) that the land patented "shall never be sold or conveyed" by the grantee without the consent of the secretary of the interior.

Mungosah v. Steinbrook.

The defendant is the grantee of the patentee under a deed made by the guardian of the grantee appointed by the probate court of Miami county, Kansas, and approved by the secretary of the interior November 5th, 1868. The records of said probate court show that the guardian was *appointed* on the application of the grantee, who was a minor, and that the probate court ordered the guardian to make sale of the land; that the sale was reported to and approved by the probate court; but the said records do not show that the guardian executed a bond as required by the laws of the state in the case of the sale of the real estate of a minor.

A. Harris, and *C. M. Foster*, for the plaintiff.

B. F. Simpson, and *Mr. Snoddy*, for the defendant.

DILLON, Circuit Judge.—Under the treaty and the legislation of congress applicable to the lands patented to the Miami Indians, it is our opinion that, as to the mode of alienation so long as the title remained in the patentees, the laws of the state had no application or operation. This is obvious from the case of the Kansas Indians (5 Wall. 737, 757, 759). The regulations of the secretary of the interior in respect to the mode of alienation of these lands have been introduced in evidence; and the sale and conveyance to the defendant were made in conformity with those regulations and were approved by the secretary, whose approval appears on the deed. If the guardian of the minor had been appointed by the council of the Indians and the sale and deed had been approved by the secretary, it would have been sufficient. It is objected that the sale in question is void because the probate court did not require a bond of the guardian before making the sale; this objection might or might not be good if the validity of the sale depended upon the laws of the state, but it does not.

JUDGMENT FOR THE DEFENDANT.

FOSTER, J. concurs.

NOTE.—See *Gray v. Hoffman*, *ante*; and *Hicks v. Butrick*, *ante*, p. 413.

REPORTS
OF
CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF MINNESOTA.

PATRICK RAHILLY *v.* WILFORD L. WILSON, Assignee of Atkinson & Kellogg.

1. Where grain is stored in an elevator warehouse with the understanding implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of the like quality, but not the identical grain deposited, nor grain from any specific mass, the transaction is a sale and not a bailment.
2. Criteria of sales and bailments stated.

(*Before DILLON, Circuit Judge.*)

Warehouse Grain Receipts.—Sale.—Bailment.

THIS is an appeal in bankruptcy from the decree of the district court, granting the relief prayed in the original bill of Rahilly, filed for himself and the other warehouse grain

Rahilly v. Wilson.

receipt holders, and dismissing the cross bill of the First National Bank of St. Paul.

The suit was brought in the district court to settle the title to twenty-one thousand five hundred bushels of wheat, or its representative in money, now lying in the registry of that court.

Geo. Atkinson & Co. and their successors, Atkinson & Kellogg, were engaged at Lake City as warehousemen and commission and forwarding merchants, during the fall of 1868, and up to December 8th, 1870, when they filed their petition in bankruptcy, and were adjudicated bankrupts.

The firm of George Atkinson & Co. was composed of George Atkinson alone, until April 1st, 1870, when Kellogg became a partner. The old name was used until September, and was then changed to Atkinson & Kellogg, and so continued until their failure, at which time they had in their warehouse the wheat in controversy, which was taken possession of by the assignee in bankruptcy.

At the date of their bankruptcy, they had outstanding warehouse receipts issued to farmers to the amount of about thirty-five thousand bushels, representing Nos. 1 and 2 grades of wheat, and two receipts dated November 23, 1870, to the amount of twelve thousand bushels, issued as collateral security for the payment of three drafts given to pay an overdrawn bank account with their bankers, to the amount of ten thousand dollars. These two receipts were issued to the drawee named in the drafts, and they had been endorsed over to their bankers. They represented twelve thousand bushels of wheat, and are now held by the First National Bank of St. Paul, having come into its possession in the course of a transaction which will hereafter be mentioned.

The complainant, a farmer, to whom some of these receipts had been issued, in behalf of himself, and the others, holding receipts to the amount of thirty-five thousand bushels, filed

 Rahilly v. Wilson.

this bill against the assignee, and seeks to appropriate the fund exclusively to the payment of their receipts. The bank, by stipulation, is made a party defendant, has answered the bill, and also filed a cross bill, alleging that it has, to the extent of its claim, a prior right to payment out of the fund in court.

Both suits were heard together in the district court upon proofs taken.

The complainant, Rahilly, and other owners, on whose behalf he sues, held receipts in the following form :

LAKE CITY, Minn 1869.

Warehouse of Geo. Atkinson & Co.

Received *in store*, of P. H. Rahilly . . . bush. No . . Wheat.

(Signed)

GEO. ATKINSON & Co.

. Per Atkinson.

Not good unless
Countersigned by
Warehouseman.

The receipts issued by Atkinson & Kellogg were similar, with the addition of the words "subject to warehouse charges and advances," and an omission of the words "in store."

The proofs show that Atkinson & Kellogg were the owners of an elevator in Lake City, constructed in the usual manner, for the purpose of receiving, storing and discharging grain—the elevating machinery being propelled by steam. There are several similar buildings in the same city, and the proofs show that business in them is conducted in the same general manner. The wheat is brought in by the farmers and is either purchased and paid for at the time by the proprietors of the elevators, or received by them and receipts issued therefor, like the one above copied.

Wheat is classified or graded into what is termed No. 1, No. 2, and rejected. Wheat when received in either mode, is tested, graded, and put into a common bin, each grade being kept distinct, but all of the same grade is mingled together, and this is the invariable practice, and known to be so.

Rahilly v. Wilson.

The warehousemen do not keep the identical wheat on hand for which receipts are issued, but sell and ship at their pleasure; at least the evidence shows that this is the general practice. The receipts specify *no time for the delivery* of the wheat to the depositor, but the usage or custom is that the holder may select his own time for presenting them, and demand either the market price of the grain on that day, *or* the quantity and quality of the grain called for in the receipt. It is expected that the ticket-holder will give the warehouseman who issued it the first privilege of buying, if he will pay as much as the holder can obtain elsewhere. In the event the holder sells to the warehouseman, the latter receives no storage, unless the grain has been carried over the winter; but if he demands grain, or sells the receipt to others, who demand grain instead of the market price or value, then the practice is to charge storage. The evidence shows that it seldom happens that the depositor demands grain, but almost invariably elects to take the money, that is the highest market rate of the grade of grain mentioned in the receipt on the day when he closes the transaction and surrenders the instrument. The warehouseman often makes advances on these receipts, charging interest.

The bankrupts, in addition to receiving wheat of farmers and issuing storage tickets as above, also purchased wheat for themselves under an arrangement with Eames & Co. of St. Paul, whereby the latter were to allow them a commission or compensation for their services, of two cents per bushel. Wheat thus purchased was paid for by the bankrupts' own checks on local banks, and the bankrupts reimbursed themselves by drafts drawn from time to time on Eames & Co. on account of wheat shipped to them. All wheat thus purchased was graded and put into its proper bin, mingled with wheat for which receipts or tickets were issued; and when shipments were made, the grain was taken

Rahilly v. Wilson.

from the amount in the elevator building. As wheat was being constantly received and constantly shipped, the amount in the elevator fluctuated from week to week. In the summer of 1870, before the new crop of that year came in, the bankrupts' elevator was entirely cleared of grain, although many of their receipts, issued in 1869, were then outstanding.

The storage capacity of the bankrupts' warehouse was about 60,000 bushels, although the amount of wheat which was received, handled and discharged therefrom in a year largely exceeded this amount.

When they failed they had on hand 21,500 bushels of wheat, of which about 18,000 had been purchased within a week previous to the failure and mixed with grain then in the building. To pay for this 18,000 bushels, the bankrupts drew checks on their local bankers, Williamson & Co. and between the 15th and 17th of November, 1870, drew in favor of these bankers three drafts on Eames & Co. for \$10,000, which were dishonored and returned to Williamson & Co. who demanded warehouse receipts as security, and on the 23d day of November, when it was known that the bankrupts had stopped business, and were in failing circumstances, the bankrupts issued two warehouse receipts for 12,000 bushels, which afterwards came into the hands of the First National Bank of St. Paul, as collateral security, with full notice of all the circumstances.

The district court held that this transaction was an attempt on the part of Williamson & Co. to obtain from the bankrupts an illegal preference, contrary to the bankrupt act, and that the St. Paul bank was affected with notice thereof, and it accordingly dismissed the cross bill of the last named bank, but decreed that the ordinary receipt holders were entitled to the grain on hand at the time the petition in bankruptcy was filed. From the decree dismissing the cross bill, the St. Paul bank appeals, and from the

Rahilly v. Wilson.

decree on the original bill, the assignee in bankruptcy appeals.

E. C. Palmer & James Gilfillan, for the assignee; *George L. Otis*, for the First National Bank of St. Paul.

Bigelow, Flandrau, & Clark, for the complainant, Rahilly.

DILLON, *Circuit Judge*.—The proofs satisfy me that the invariable and known course of business at the elevator warehouses in Lake City, was to mingle together all grain of the same grade, whether purchased outright and paid for at the time, or received on tickets specifying the grade and quantity and which contemplated the future delivery of the like amount of the same grade of wheat to the holders of such receipts when they should call for it, or the payment in money of the value of that amount and quality of grain. Those who deposited wheat must be taken to know, and in fact did know, that it would be thus mingled with other grain; that it would be shipped and sold by the warehousemen, when the latter should deem it to be for their interests (for such was the uniform practice), and consequently if the depositor should demand wheat instead of the value of the wheat, he would not receive, unless by accident, any of the identical wheat deposited, nor any of the immediate mass into which it went. As wheat was being daily received and constantly shipped, the amount on hand fluctuated from time to time. In July, 1870, there was not a bushel of wheat in the elevator building, although many receipts for the crop of the previous year, or years, were outstanding. The proofs show that it was very unusual to deliver wheat to the depositor, as he almost always chose to take the value of the amount and quality called for in the receipt at the date when he desired to surrender it and close the transaction.

Under these circumstances the question is, what is the re-

Rahilly v. Wilson.

lation which exists between the grain depositor and the warehouseman? Is the depositor a bailor, simply, and the warehouseman a bailee, or is the former a seller, and the latter a purchaser, of the wheat? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence that the grain at any time on hand belongs to the depositors to the extent of their receipts or tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defence to any demand on the part of the ticket holder either for the wheat or its value — a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases. (*Chase v. Washburn*, 1 Ohio St. 244, 1853; *The South Australian Insurance Company v. Randall*, Law Rep. 3 Privy Council Appeals, 101, 1869.)

Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and

Rahilly v. Wilson.

is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value; in which case it is a sale, and the title passes, and the receiver becomes a debtor for the stipulated return. (Jones on Bailments, 64, 102; Story on Bailments, sec. 439; 2 Kent's Com. 590.)

That this is a correct view of the relations between the wheat depositors and the bankrupts is expressly adjudged in the following cases, which, in their facts, are identical with the one under consideration. (*South Australian Insurance Company v. Randall*, *supra*; *Chase v. Washburn*, *supra*; *Loneragan v. Stewart*, 55 Ill. 44, 1870; *Johnson v. Brown*, *infra*. See *Myers v. Adams*, 8 Nat. Bankr. Reg. 214; *Stearns v. Raymond*, 26 Wis. 74.)

Applying the principle above mentioned, the privy council in the case of the South Australian Insurance Company, in an elaborate judgment, decided, where corn was deposited by farmers with a miller to be "stored," and used as part of the current or consumable stock or capital of the miller's business, and was by him mixed with other corn deposited for a like purpose, subject to the right of the farmers to claim at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it is to be taken, or in lieu thereof, the market price on any equal quantity, on the day on which he made his demand, with a small charge for general purposes, that the transaction was a *sale* by the farmer to the miller of the corn deposited, and not a bailment. In giving their lordship's judgement, Sir Joseph NAPIER says: "It appears to their lordships that there is no sound distinction, in principle, between this, and the case of money deposited with a banker on a deposit receipt; * * * that it is not the case of a possession given (by the farmer) subject to a trust, but that it is the case of property transferred for value, at

Rahilly v. Wilson.

the time of delivery, upon special terms of settlement. Law Rep. 3 Privy Council App. 109, 311.

And so the supreme court of Iowa, in *Johnson v. Brown*, 37 Iowa, 200, 1873, has also held. In the case just cited, wheat was left in an elevator with the understanding that when the depositor should be ready to sell it, the proprietor of the elevator would give the highest market price or the same amount of wheat of like grade and quality — the custom being to ship off grain, but to keep on hand sufficient to fill outstanding storage receipts, but not the identical wheat received — and it was adjudged that the transaction was a sale and not a bailment.

I regard the case at bar distinguishable from *Young v. Miles*, 20 Wis. 615; 23 Wis. 643; and *Kimberly v. Patchin*, 19 N. Y. 330, and like cases, where the bulk from which the mingled articles were to be taken was specific and not subject to constant fluctuations.

I am of opinion, therefore, that the court erred in holding that the receipt owners had the right to the wheat in the warehouse as against the assignee, and its decree in this respect is reversed, and a decree will be entered here dismissing the bill.

I may add, that I am entirely satisfied, in the light of the mode of conducting business at the grain elevators, as shown in the testimony, that the foregoing is a sound view of the relation between the grain depositor and the proprietor of the elevator, and that legislation to protect the former against the insolvency of the latter, would appear to be called for.

In respect to the claim of the bank upon the two wheat receipts for 12,000 bushels, made by the bankrupts after their failure, to secure \$10,000 to their local bankers, I concur so fully in the views of Judge NELSON that I do not deem it essential to do more than refer to his opinion. The decree of the district court, dismissing the cross-bill of the

Rahilly v. Wilson.

bank is affirmed. The cause will be remanded to the district court with directions to tax the costs in that court equitably as between the receipt holders and the bank. The costs on this appeal will be borne equally between the same parties.

DECREE ACCORDINGLY.

NOTE.—In *Chase v. Washburn*, 1 Ohio St. 244, the receipt of the warehouseman, was: "Milan, O. Nov. 5th, 1847. Received in store from J. C. W. thirty bushels of wheat. H. Chase & Co." The evidence *aliunde* showing that the wheat was received with an understanding that the warehouseman might dispose of it, and that, upon demand, he would return other grain, or pay for that deposited, the transaction was adjudged a sale and not a bailment, and therefore it was no defense to the warehouseman that his warehouse was destroyed by fire at a time when it contained wheat enough to answer all his outstanding receipts.

So, in the case of the *South Australian Insurance Co. v. Randall*, Law Rep. 3 Priv. Council App. 101, 6 Moore P. C. N. S. 341, as in the case to which this note is subjoined, the receipts issued to the farmers by the miller were "to store," and under the circumstances stated in the foregoing opinion, the transaction was considered to be a sale.

In 6 Am. Law Rev. 450, the reader will find a valuable article entitled "*Grain Elevators: the title to Grain in Public Warehouses.*" The case of *Chase v. Washburn* is there printed in full, and is selected "as presenting the ablest exposition of the opposite opinion" to that which the annotator there maintains to be the true doctrine. In that note is cited, perhaps, every reported case on the subject of the title to grain in elevators which had been decided down to April, 1872. The substance of that note will be found condensed in Holmes' edition of Kent's Commentaries. 2 Kent Com. 12th ed. 590.

The case of *Rahilly*, *supra*, is one where there was an understanding implied from the known and invariable course of business, that the warehouseman might mingle the specific wheat deposited with other wheat of like quality, and dispose of it at his pleasure, with the further understanding that on demand, he would pay the depositor the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass. We have found no adjudged case which holds such a transaction to be a bailment, but there are several directly to the point that it is a sale. Such a case is obviously distinguishable from that of a specific deposit which is not to be changed by the warehouseman, but retained by him until called for by the depositor. This is a bailment. And the case

Rahilly v. Wilson.

is distinguishable, also, from those where specified amounts of grain of different owners is mixed by consent in specific mass, without any understanding that the warehouseman might dispose of the grain so deposited and mingled. And it may be different from the case where the proprietor of the elevator is a mere warehouseman and where his course of business is, and his duty is, always to keep on hand in the elevator sufficient grain to meet all outstanding receipts, though not the particular grain received. We say it *may* be different from such a case, but it is doubtful whether it is so. See *Johnson v. Brown*, 37 Iowa, 200, 1873. But where it is known by the depositor that the warehouseman is himself buying and selling grain on his own account, and also receiving grain "in store," and that he intermingles all that is so obtained, and is constantly buying, receiving and selling, so that the mass is continually fluctuating, and there is no fixed time when the receipts are to be presented, it seems impossible to consider the holders of the outstanding receipts as tenants in common of the whole mass of wheat in the elevator in proportion to the amount of their receipts. And such a case seems to be the same in principle as an ordinary general deposit of money in a bank; it creates simply the relation of debtor and creditor; and so the privy council in the case of the Australian Ins. Co. above cited, considered it.

The very recent case of *Butterfield v. Lathrop*, 71 Pa. St. 225, goes upon the same principle. Here, Baxter and numerous other farmers delivered milk to a cheese factory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in proportion to the milk furnished; Baxter's interest in the cheese, etc. was sold under an execution against him: *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmer's partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner.

On the general subject see and compare *Oushing v. Breed*, 14 Allen, 376; *Warren v. Milliken*, 57 Maine, 97; *Dale v. Olmstead*, 36 Ill. 150; 2 Kent Com. 12th Ed. 590, and cases cited in Mr. Holmes' note. The decision in Rahilly's case was acquiesced in. See *Hamilton v. Railroad Company*, *ante*. [R.R.]

United States v. George.

UNITED STATES v. HIRAM GEORGE, WILLIAM H. GRANT and
FRANCIS X. BROSSÉAU.

1. Leave by the trial court to the plaintiff to *amend his declaration* upon a forfeited recognizance given in a criminal proceeding, held not to be erroneous.
2. Where a recognizance contains the usual provision that the party shall appear to answer to a particular charge "and not depart said court without leave thereof," *it seems* not to be essential to its validity that it shall on its face describe the particular offense with which the party is accused.
3. The recognizance in suit held to describe the particular offense with sufficient certainty.
4. In a proceeding upon a recognizance by declaration instead of *scire facias*, it is not necessary where the officer taking it has jurisdiction over cases of the general description named in the recognizance to aver the existence of the particular facts, which establish that the officer had authority to take it; following *People v. Kane*, 4 Denio, 530, and *State v. Grant*, 10 Minn. 39.

(Before DILLON, Circuit Judge.)

Recognizance.—Authority to Take.—Requisites of Declaration.

WRIT of error to the district court. The action in the district court was upon a recognizance entered into by the plaintiffs in error as the sureties of one Hiram George, in the sum of \$5,000, before by I. N. Cardozo, esq. a commissioner for the circuit court for the district of Minnesota.

The *condition* of the recognizance appears in the following opinion of NELSON, J. in the district court, on demurrer to the petition :

NELSON, J.—This action is brought on a recognizance entered into before a commissioner of the United States circuit court, by which Hiram George, as principal, Wm. H. Grant and Francis X. Brosseau, acknowledge that they owe the United States five thousand dollars upon the condition "that the said Hiram George shall be and appear at the district court of the United States, to be holden at Winona,

United States v. George.

in said district, on the first Monday of June, A. D. 1869, to answer to such matters and things as shall be objected to him on behalf of the United States for unlawfully, falsely and deceitfully uttering and publishing as true, certain false, forged and counterfeited writings for the purpose of defrauding the United States, then and there knowing the same to be false, forged and counterfeited, and not depart said court without leave thereof," &c. It is alleged in the declaration that the recognizance was filed for record, and that at the June term of the court, 1869, on the first day thereof, the defendant was called to appear, but that he failed to do so, and a default was entered against all the parties. A demurrer was filed by the defendants. The point presented by the demurrer and relied upon by the counsel for the defendants is, that no offense is charged in the recognizance over which this court can take jurisdiction.

The statute (14 Stats. at Large, 12), enacts "that if any person or persons shall utter and publish as true, any false, forged, altered or counterfeited bond, bill * * * or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited, every such person shall be deemed guilty of a felony, and shall be punished," &c. The commissioner, in the recognizance, has followed the language of the statute without particularly setting forth the kind of writing with which the accused intended to defraud the government. The intent being the gravamen of the charge, and a necessary ingredient of the crime, the authority of the commissioner to act is apparent from the instrument; the offense is set forth with sufficient clearness to enable the accused to ascertain the principal charge he was expected to meet, and greater nicety in setting out the offense was, to say the least, discretionary; it was not required in the warrant of arrest, would have been unnecessary in the mittimus, and no good reason can be urged why it should be any more mi-

United States v. George.

nutely described in the recognizance. In warrants of arrest some eminent criminal writers have claimed that it was unnecessary to set out the charge or offense at all, and none have deemed it necessary to set forth the offense alleged against the party with more than convenient certainty. The same rule would apply to the recognizance, and enough should be set out to show jurisdiction; no greater certainty is required. The case in 6 McLean, 274, cited by the counsel for the defendants, is not inconsistent with the views laid down by us in regard to statutory offenses. In that case the defendants entered into a recognizance upon the condition "to answer a charge of wilful and corrupt conspiracy for burning the steamboat Martha Washington on the Mississippi river."

It is an offense against the laws of the United States to enter into a conspiracy to burn a steamboat with intent to injure certain underwriters. The court sustained the demurrer on the ground that no offense could be committed over which the federal courts had jurisdiction, unless the conspiracy to burn had been entered into with intent to injure the persons named in the act of congress creating and defining the crime. The *intent* in the case before us is a necessary element of the offense, and is fully set forth in the recognizance. Without the allegation that the uttering and publishing as true, was with the fraudulent intent specified in the statute, no crime would have been set out. Any writing, without reference to its character, when uttered and published with the intent specified in the act of congress, will subject the party to a criminal prosecution under this statute (vol. 14 Stats. at Large, 12). So under the act of congress considered by the court in the 6 McLean, it was not the name of the steamboat that entered into the offense created by the statute, but the *intent* with which the conspiracy was entered into.

United States v. George.

Upon this view of the case I think the demurrer should be overruled, with leave to plead in twenty days.

On the overruling of this demurrer the defendants pleaded that at the time of making the recognizance the said Hiram George was unlawfully imprisoned by the said Cordozo and others in collusion with him, in the common jail, and was there unlawfully kept and detained until the said recognizance was executed to procure the release of the principal from such wrongful imprisonment. Issue was taken on this plea, and the case was by stipulation tried to the court, who found that the bond was not procured in the manner pleaded, and gave judgment against the defendants for the amount of the recognizance.

To reverse this judgment, the sureties in the recognizance prosecute this writ of error.

Masterson & Simons, for the plaintiff in error.

Wm. W. Billson, district attorney, for the United States.

DILLON, *Circuit Judge*. — I. The recognizance in this case was sought to be enforced by a complaint or declaration, and thereto the defendants first pleaded, in effect, *null tiel record*, and on this plea the cause was tried before the court, and after its submission the court "ordered that the plaintiff have until the first day of the next term to amend its complaint, and upon failure to do so that judgment be entered in favor of the defendants."

The action of the court permitting the plaintiff to amend the declaration is assigned as error. The record does not state that any exception to this ruling of the court was taken, and there is nothing to show that the court improperly allowed the declaration to be amended.

II. An amended declaration having been filed, the defendants demurred thereto, substantially on the ground that no offense is stated in the recognizance over which the

United States v. George.

court can take jurisdiction. The demurrer was overruled, and this ruling is now assigned as error. This objection assumes that it is essential to the validity of a recognizance that it shall specify or describe the particular offense with which the principal cognizor is charged — a proposition which I do not decide, though I do not wish to be understood as conceding it to be sound. It is perhaps sufficient that the papers filed in the principal case or proceeding, and the entries of record therein, show that the recognizance is one taken by a competent court or officer in a proceeding properly commenced, and within the jurisdiction of the tribunal or magistrate taking the obligation. *State v. Randolph*, 22 Mo. 474, and authorities cited.

The recognizance in suit contains, *inter alia*, a provision that the principal should “not depart from said court without leave thereof,” the effect of which, according to Hawkins (Pleas Crown b. 2 c. 15, sec. 84), whose language is approved in the last case cited, is that the party shall not only appear and answer the particular charge, but also “be forthcoming and ready to answer to any other information exhibited against him while he continued not discharged.” See also *People v. Stager*, 10 Wend. 431; *Chaplin v. People*, 2 Comst. 81.

I believe there are cases in this country holding that such a provision does not dispense with the necessity of the recognizance describing the particular charge for which the party is to answer, but I do not care to enter upon this inquiry, because, conceding for the purposes of this case, that the special offense must be described in the recognizance, my judgment is that in the case before me it is described with sufficient certainty. The reasons for this view are very satisfactorily stated in the opinion of the district judge in whose conclusion I fully concur, and whose judgment will be found supported by the following cases; *State v. Randolph*, *supra*; *State v. Rogers* (horse stealing), 36 Mo.

United States v. George.

188; *State v. Marshall* (seduction), 21 Iowa, 144; *Beismer v. People*, 15 Ill. 489; *Browder v. State*, 9 Ala. 58; *Hall v. State*, 9 Ala. 827; *Commonwealth v. Nye*, 7 Gray, 316; *People v. Blankman*, 17 Wendell, 252; *State Treasurer v. Bishop*, 39 Vt. 353.

III. The next assignment of error is that the recognizance on its face, or in connection with facts stated in the declaration, does not show that the commissioner had any jurisdiction or authority to take it. And in argument it is insisted that it does not appear by the recognizance or such parts of the record as are before the court that the offense was committed by George within the district, or when committed, etc.

It is not necessary that these circumstances should be shown on the face of the recognizance. In New York, where the proceeding is by declaration instead of *scire facias*, it has been expressly decided that in such a declaration it is not necessary to aver the special facts showing the officer had authority to take the recognizance in the particular case. *People v. Kane*, 4 Denio, 530; *Chaplin v. People*, 2 Comst. 81; and these cases have been expressly approved by the supreme court of Minnesota, as applicable to the proceedings in this state as to admitting offenders to bail. *State v. Grant*, 10 Minn. 89, 48. *United States v. Rundlett*, 2 Curtis, C. C. R. 41; *United States v. Horton's Sureties*, 2 Dillon, C. C. R. 94; *Ferguson v. State*, 4 G. Greene (Iowa), 302.

As none of the assignments of errors are well taken, the judgment of the district court must be affirmed.

AFFIRMED.

Seymour v. Sanders.

WILLIAM H. SEYMOUR, *et al.* v. DANIEL SANDERS AND WIFE.

1. The fourth section of the homestead act of congress of May 20th, 1862 (12 Stats. at Large, 393), which provides that no lands acquired thereunder shall in any event become liable to any debt contracted prior to the issuing of the patent therefor, is valid and binding upon the states.
2. The power of congress to dispose of the public domain, and the policy of the above exemption provision in the homestead act, considered.

(Before DILLON and NELSON, JJ.)

Public Lands.—Homestead Act.—Exemption Provision.

THIS was an action of ejectment to recover possession of eighty acres of land in Goodhue county, Minnesota.

The plaintiffs allege that they were owners of the land November 1st, 1872, and that the defendants unlawfully detain the same.

The defendants in their answer allege that ever since April 10th, 1868, they have been and before that time were, and still are owners in fee of said lands and are in possession thereof, and that Daniel Sanders duly entered it at the local land office under the homestead act of congress (12 Stats. at Large, 392), and holds and occupies it as a homestead with his family, and that no patent has ever been issued.

The cause was tried on a stipulation as to the facts. From this stipulation it appears that Daniel Sanders, on March 14th, 1868, settled upon, improved and entered, one hundred and sixty acres of the public lands under the said homestead act. That he complied with said act and proved, perfected and completed his right to a title on April 10th, 1868, and on that day became entitled to a patent and received the final certificate, signed by the proper receiver of the United States land office. It does not appear that the patent has yet issued. The plaintiffs obtained judgment in the state court against Daniel Sanders on May 25th, 1868,

Seymour v. Sanders.

and on the same day docketed it in the office of the clerk of that court in Goodhue county, where the land was situated.

By *General Statutes of Minnesota*, pp. 485, 486, sec. 254, judgments are liens on all the real property of the judgment debtor in the county or afterwards acquired by him.

The plaintiffs issued execution on this judgment August 30th, 1871, and Sanders selected and the sheriff set off to him as exempt, the south half of the said 160 acres, under the state exemption laws (*Gen. Stats. of Minnesota*, p. 498, ch. 18), and sold the north half (being the land in dispute) to the plaintiffs on October 21, 1871. One year from such sale expired and no redemption was made from the sale, and under the statute the certificate became evidence of absolute title in plaintiffs without further conveyance. (*Gen. Stats. of Minnesota*, p. 491, sec. 290.)

Daniel Sanders made a deed of this eighty acres of land to his wife, Mary Ann Sanders, on April 23d, 1868, and for that reason she is made a defendant. This deed was not recorded until June 24th, 1869. By the *Gen. Stats. of Minnesota*, p. 500, sec. 2, such a deed is permitted if the conveyance contains a power of disposition by deed, will, or otherwise (*Leighton v. Sheldon*, 16 Minn. 243), but is void as to his creditors unless recorded in proper registry within seventy days after its execution and delivery. This deed does not contain such power and was not so recorded. The plaintiffs were his creditors, and as such claim that the deed to the wife was void. The stipulation provides that if the fourth section of the homestead act, so called (12 Stats. at Large, 392), is, in its application to this case, constitutional, and a valid and binding regulation of the judicial power and policy of the state of Minnesota and paramount to the state laws and regulations in regard to exemptions from levy and sale on writs of execution, then judgment shall be given for the defendants, otherwise for the plaintiffs.

Seymour v. Sanders.

The *Gen. Stats. of Minnesota*, p. 448, sec. 269, provide that all property, real, personal or mixed, belonging to the defendant in the execution may be levied upon and sold. But by the *same statutes*, p. 498, sec. 1, it is provided that a homestead in quantity not exceeding *eighty* acres and the dwelling house thereon, to be selected by the owner thereof, and owned and occupied by any resident of this state, shall not be subject to levy or sale upon execution.

The act of congress approved May 20th, 1862 (12 Stats. at Large, 593), provides that no lands acquired under that act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

By the act of congress approved February 26th, 1857 (11 Stats. at Large, 167, sec. 5) authorizing the people of Minnesota to form a constitution, it was provided that the state should "never interfere with the primary disposal of the soil within the same by the United States, or with any regulation congress might find necessary for securing the title in said soil to *bona fide* purchasers thereof." These provisions were incorporated into the state constitution (art. 2, sec. 3), and were ratified by a vote of the people. The state was admitted into the Union May 11th, 1858, on an equal footing with the original states.

Chas. C. Wilson, for the plaintiffs.

C. & J. C. McClure, for the defendants.

DILLON, *Circuit Judge*.—Congress is invested by the constitution with the express power of disposing of and making all needful rules and regulations respecting the public domain. This gives to congress authority to dispose of the public lands without limitation, and leaves to its discretion the mode of disposition. (*United States v. Gratiot*, 14 Pet. 526.)

If the land here in question were within one of the terri-

Seymour v. Sanders.

teries of the United States it would hardly be doubted that congress could lawfully provide in an act for the disposal of the public lands that it should not be liable for debts contracted by the homestead settler prior to the issue of the patent. This the learned counsel for the plaintiffs conceded, but they claim that sec. 4 of the homestead act of congress, of May 20th, 1862, should be limited in its application to the public domain outside of the respective states. But the power of congress within the limits of the state of Minnesota is, in our judgment, precisely the same as respects the mode and purposes of disposing of the public lands, as it is within the territories.

Over the public lands, so far as concerns their disposition, whether as to time, mode or objects, the state has no authority whatever. On the other hand, the authority of congress is paramount and exclusive. Any question upon this subject which might otherwise exist, growing out of the respective powers of the state and federal governments, is precluded by a solemn compact in the act providing for the admission of the state, and in the constitution of the state itself, to the effect that the state would "never interfere with the primary disposal of the soil within the same by the United States, or with any regulation congress might find necessary for securing the title in said soil to *bona fide* purchasers thereof."

Thus the plenary power of congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.

The title to all public lands must pass and vest according to the laws of the United States (*Wilcox v. Jackson*, 18 Pet. 498, 517). And, undoubtedly, it is true as a general proposition, that after the title has passed from the United States, and is fully vested in purchasers from it, the land becomes subject

Seymour v. Sanders.

to state legislation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the act by which congress disposes of the land.

It has been expressly adjudged by the supreme court that congress cannot be confined to any particular mode of disposition, but may lease or otherwise dispose of the public domain in its discretion (*United States v. Gratiot, supra*).

Down to 1862, congress had never adopted the policy of offering the public lands to those who would cultivate and make permanent homes upon them, and the act of May 10th, of that year, is the first homestead law of the general government. It would be difficult, perhaps, to point to any enactment of the federal congress more wise in conception, just in policy, and beneficial in results, than this. And these benefits were chiefly to the states by securing therein at an early day a large body of permanent settlers upon the public lands. By the act a quantity of land not exceeding 160 acres is given to any head of a family possessing the required qualifications, on condition of settlement, cultivation and continuous occupancy as a home by the settler for the period of five years. During this period the settler is prevented from alienating any part of it, or from making any actual change of residence, or from abandoning the land for more than six months at any time. If he complies with the provisions of the act, he becomes entitled to a patent at the end of five years.

Section 4, the validity of which, in its application to this case, is the question to be settled, is in these words: "No lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor."

It is not difficult to discover the reason for this provision. A leading object of the enactment was to benefit the poor man who was unable to buy the lands at government price

Seymour v. Sanders.

and receive his title at once and without conditions; and it undoubtedly occurred to congress, that many persons who had been unfortunate and were insolvent would avail themselves of the act; and conceiving that the creditor in such cases had no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government, and to protect the debtor and to encourage persons to settle upon the public domain under the act, the fourth section was adopted. In the case before us the debt upon which the plaintiffs obtained judgment was created after the defendant had settled upon the land under the homestead act of congress, and before the expiration of the five years, so that the creditor was all along apprised that the land was not liable to the payment of his debt, and certainly he is without just ground of complaint against the exemption. His legal ground of objection, however, is that the exemption is an invasion of the lawful rights of the state, and conflicts with her laws which exempt only 80 acres of land to the debtor. It will be observed that congress does not attempt to exempt the land from debts contracted after the patent has issued, or, in other words, after the title has passed from the general government. Before the title has thus passed, congress, under its power to dispose of the public lands, may prescribe the terms and condition upon which the disposition shall be made, and as against the state, it is our judgment that it was competent for congress as incidental to the power of disposal of the lands, and to promote the enlightened and humane policy it had in view, to provide that the lands acquired by the homestead settler should be held by him free from all antecedent debts.

This question, which is one of great practical moment, and affecting, as counsel inform us, very many persons, does not appear to have before arisen for judicial determination, but we feel quite confident that our conclusion is correct.

Seymour v. Sanders.

Agreeably to the stipulation of counsel, in case we should be of opinion that the fourth section of the act is valid, judgment will be entered for the defendants.

NELSON, J. concurs in the foregoing, and is of opinion also that the same result follows from the fact that no patent has ever emanated from the government, and hence the plaintiff not having legal title cannot maintain ejectment.

JUDGMENT FOR DEFENDANTS.

NOTE.—Since the foregoing opinion was delivered, the supreme court of Minnesota, in the case of *Russell*, respondent, v. *Louth & Howe*, appellants have decided, under section 4 of the homestead act of May 20, 1862, that land patented to an actual settler under said act of congress does not become liable for debts of the patentee contracted prior to the issuing of the patent, if conveyed to another person. The provision of the state constitution "that this state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title to said soil to *bona fide* purchasers thereof" (art. 2, sec. 8) is an express inhibition of the state legislature to pass any law subjecting lands patented under the act of congress known as the homestead act, to levy and sale upon execution, issued upon a judgment for a debt of the patentee created prior to the issuing of the patent. Same principle, see *Miller v. Little*, 47 Cal. 348, 1874. In *Nycum v. McAllister*, 33 Iowa, 374, it was held that the provision in section 4 of the federal homestead act of May 20, 1862, which provides that "no lands, acquired under the provisions of this act shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent," was not designed to disable the settler from mortgaging his interest in the premises before the issuing of the patent. In this case the right of a mortgagor to a patent was perfected, he having resided on the premises more than five years. [REP.]

Marrett v. Atterbury.

THOMAS B. MARRETT, Assignee in Bankruptcy of Baker,
Surviving partner of Atterbury, Baker, & Co. Appellant,
v. **EDWARD J. C. ATTERBURY**, Appellee.

A creditor of a bankrupt included in his proof of debt claims against a bankrupt's estate, part of which was invalid and the rest valid, and made the claim in this manner intentionally, knowing that only part of it was legal, and supported the claim for the whole amount by a false oath: *Held*, that the effect of this fraudulent conduct on the part of the claimant was to disentitle him to any dividends whatever on any part of his claim.

(Before MILLER, Circuit Justice.)

Bankrupt Act, Sec. 22.—Fraudulent Proof of Debt.—Effect on Right to Dividends.

APPEAL in bankruptcy. A motion was made in the district court by the assignee in bankruptcy of John W. Baker, surviving partner of Atterbury, Baker, & Co. that the proof of the claim or debt of Edward J. C. Atterbury be declared fraudulent as to creditors, and that no dividends be paid thereon. This motion was resisted by the said E. J. C. Atterbury. The claim of said Atterbury, as filed and proved against the estate, was for the sum of \$19,155.25, for moneys advanced to the firm at various times from December 30, 1872, to April 13, 1873, as per statement or account annexed to claim. The claimant swore to the correctness of his entire claim in making proof of his debt, and that he held only a note for \$10,000 and one for \$363. The district court found upon the testimony that the first \$10,000 of the amount claimed by E. J. C. Atterbury was intended as an advance to his son (the deceased member of the firm of Atterbury, Baker, & Co.), and not provable as against creditors, and that the note for \$363, interest thereon, fell in the same category. The district court held that the subsequent advances by the father were made to the firm as loans, and that court, accordingly, made an order reducing the amount

Marrett v. Atterbury.

of E. J. C. Atterbury's claim to \$9,155.25, and allowing it to stand as a valid claim against the estate to that extent. As Baker, the surviving partner, had given his note for the controverted amount of \$10,000, and had placed the entire claim for \$19,155.25 in the schedule of firm debts, the district court did not, under the circumstances, consider the claim of E. J. C. Atterbury as one so founded in fraud as to taint and vitiate it entirely, and accordingly allowed the amount which was loaned, \$9,155.25, to stand as a claim against the estate, and rejected the balance, as having been made as an advance or gift by the claimant to his son.

The following is the opinion of the district judge:

NELSON, J.—I think the evidence fully establishes the fact that there should be a diminution of the debt proved by E. J. C. Atterbury. Although he held the note of the firm of Atterbury, Baker, & Co. for \$10,000, given in January, 1873, it clearly appears that so far as the other creditors of the late firm are concerned it cannot be considered as a valid claim entitled to be entered on the list of debts recorded for dividends. This creditor had many times previous to the execution and delivery of the note to him informed the other creditors of the firm, that the amount specified in this note, and for which it undoubtedly was given, had been advanced to his son who was a member of the late firm of Atterbury, Baker, & Co. as capital to carry on the business. Now he cannot be permitted to assert any claim against the assets at this time even upon the theory that they considered their financial condition so improved as to justify their consent to a withdrawal of this capital at any time, and had executed a note for it payable on demand. Baker, the surviving partner, in making up his schedule, has placed the note among the debts of the firm, and in his testimony states that he consented to the execution and delivery of it to the creditor. I think, therefore, under these circumstances, it cannot be considered as a

Marrett v. Atterbury.

claim founded in fraud which should taint the whole indebtedness proved up by the creditor against the estate. I do not think any collusion between the surviving bankrupt partner and this creditor has been shown, and no deliberate fraud has been attempted to be practiced upon the other creditors which would authorize me to reject the whole debt. The note for \$363 given for the interest upon the various drafts which were included to make up the \$10,000 advanced as above stated, must also be rejected. This will reduce the debt to that extent in addition to the \$10,000.

An order will be entered in accordance with form No. 66, reducing the amount to nine thousand one hundred and fifty-five dollars and twenty-five cents (\$9,155.25), which includes the interest up to May 22, 1873. From this order the assignee in bankruptcy appealed to the circuit court, and there urged that the district court should have disallowed the *whole claim*, and prohibited it from sharing to any extent in the dividends of the bankrupt estate, at least until the other general creditors were paid in full, for the reason that the claim was founded in fraud, and that the proof of it was fraudulent, and false, and known to be so by the claimant.

The motion of the assignee was made under a provision in section 22 of the bankrupt act, to the effect that the court shall reject claims founded in fraud, illegality, or mistake.

On the appeal, the assignee's counsel, in their brief, "admitted that the amount allowed E. J. C. Atterbury by the district court, to-wit, \$9,155.25 was justly due to him from Atterbury, Baker, & Co. or the bankrupt, as the surviving partner at the time he made and filed his proof of debt against the bankrupt's estate, but submits that the attempt of said claimant to sustain his proof of debt for the full amount claimed, \$19,155.25, by the false and fraudulent testimony of the claimant himself, has the effect to deprive him of any right to dividends until the other general creditors are paid

Marrett v. Atterbury.

in full." The appeal was argued before Mr. Justice MILLER, at the June term, 1874, and by him taken under advisement. Subsequently, after much consideration, he made the findings of facts and conclusion of law below given.

E. C. Palmer and *J. A. Marvin*, for the assignee.

Morris Lamprey, for E. J. C. Atterbury.

MILLER, *Circuit Justice*.—I find the following facts:

1. That Atterbury, the father, advanced to his son, the partner of Baker, the sum of \$10,000, which was not intended as a loan to the partnership, but as an advance to the son by the father, which was no just claim against the insolvent partnership.

2. I find that said Atterbury, the father, also loaned the partnership the further sum of \$9,155.25, which was intended by both the father and the members of the partnership as a loan of money to the firm, and which, but for the next finding of fact, would now be a valid claim against the assets of the bankrupt firm in the hands of the assignee.

3. I find that the appellee, Edward J. C. Atterbury, the father, with full knowledge that the sum of \$10,000 aforesaid was an advance to his son, and well knowing that he had induced some of the creditors of the firm to extend credit by his statement that this \$10,000 was such an advance, and was not claimed by him as a debt against the firm, did, nevertheless, claim that sum and the \$9,155.25, also, in all the sum of \$19,155.25, against the estate of the bankrupts, and did file that claim with the assignee, and did support that claim by a false oath, and did, in support of it, in this suit falsely swear that it was not an advance to his son, but was a just claim against the assets of the firm in the hands of the assignee.

Conclusion of law. And I am of opinion as a conclusion of law from the foregoing facts, that said Edward J. C. At-

McKenty v. Universal Life Insurance Company.

terbury, is not entitled to receive from the assignee of said bankrupt partnership any part of said sum of \$19,155.25, neither the \$10,000, advanced to the son, nor the \$9,155.25 actually loaned to the partnership.

The result is that the decree of the district court is reversed, and a decree entered here disallowing said Atterbury's claim as a creditor, and dismissing his claim with costs.

Let a decree be entered accordingly.

DECREE ACCORDINGLY.

NOTE.—As to single and entire debts, and divisible demands see *In re Richter*, 1 Dillon C. C. 544.

JOHANNA MCKENTY v. UNIVERSAL LIFE INSURANCE CO.

A policy of insurance was issued for \$8,000 upon the life of a debtor, payable upon his death to his creditor: on the death of the assured, the creditor holding the policy received from the insurer \$2,050.57, "in full of all claims under the policy," and surrendered it; afterwards the creditor assigned "all his right, title, and interest in the policy" to the administratrix of the assured, subject to the amount he had received from the company in payment of his debt. *Held*, that an action by the administratrix, under such assignment, against the insurer for the balance of the \$8,000 could not be maintained.

(Before NELSON, J.)

Life Policy.—Insurable Interest of Creditor.—Surrender of Policy by Creditor.

THE plaintiff, administratrix of the estate of Henry McKenty, deceased, brought suit upon a policy issued on the latter's life by the defendant. The following is a copy of the policy:

"Universal Life Insurance Company, of New York.

 McKenty v. Universal Life Insurance Company.

"This policy of insurance witnesseth, that the Universal Life Insurance Company, in consideration of the representations made to them in the application therefor, and of the sum of \$86.10, lawful money of the United States, first in hand paid by Henry McKenty, and of the quarter-annual payment of a like amount on or before the 14th days of October, January, April, and July, in every year during the continuance of this policy, at the office of said company in the city of New York, or to their agents, as hereinafter provided, do hereby promise and agree to pay to Charles H. Parker, the assured under this policy, his heirs, executors, or assigns, at their office aforesaid, the sum of three thousand dollars, lawful money of the United States (the balance of the current year's premium, if any, being first deducted therefrom), in thirty days after due notice and proof of the death of Henry McKenty, of San Francisco, in the county of San Francisco, and state of California, whereupon this policy shall cease and determine."

* * * * *

"In witness whereof the said Universal Life Insurance Company have, by their president and secretary, signed and delivered this contract this fourteenth day of October, A. D. 1868.

"WM. WALKER, *president*.

"JNO. H. BEWLEY, *secretary*."

Parker, the assured, was a creditor of McKenty, and after his death, on payment of his debt, executed the following receipt:

"NEW YORK, *February 26, 1870.*

"Received from the Universal Life Insurance Company two thousand and fifty-six and 57-100 dollars, in full for all claims under the within policy, terminated by the death of Henry McKenty.

"C. H. PARKER."

On receiving this amount, Parker surrendered the policy to the company. Afterwards, and on the 12th day of April,

McKenty v. Universal Life Insurance Company.

1871, Parker executed the following assignment to the plaintiff, administratrix of the estate of her husband :

“SAN FRANCISCO, *April 12*, A. D. 1871.

“For value received I hereby assign to Mrs. Johannah D. McKenty, as administratrix of the estate of Henry McKenty, late of St. Paul, Ramsey county, Minnesota, deceased, all my right, title and interest in, to and by virtue of a certain policy of insurance number 5,736, dated October 14, 1868, made and issued by the “Universal Life Insurance Company” of New York, to said Henry McKenty, then of San Francisco, California, for \$3,000, payable to myself (Chas. H. Parker). This assignment being made to said Mrs. McKenty, as aforesaid, subject to the payment of the sum of about sixteen hundred dollars heretofore paid to me thereon by said company and receipted for by me. This assignment is made without recourse to me in any event or under any circumstances.

“CHARLES H. PARKER.”

On the trial the court ruled as shown in the opinion below given.

Gilfillan & Williams, for the plaintiff.

Lorenzo Allis, for the defendant.

NELSON, J.—This contract of insurance was effected by Parker, although the first premium appears to have been paid by McKenty. Parker was a creditor of McKenty, and had such an insurable interest as would entitle him to recover in a suit against the company, had it refused payment to him.

The better opinion at this time is that policies of life insurance are not like fire and marine insurance, contracts of indemnity. The agreement is that in consideration of a certain annual, semi-annual or quarter-annual payment of money to the company, it will, on the death of the party

McKenty v. Universal Life Insurance Company.

whose life is insured, pay to the person named in the policy a certain amount therein specified.

It is unnecessary in this case to decide whether upon this policy the assured named therein could recover any more than his debt due at the time of the death of his debtor. This action is not brought by him as the beneficiary named in the policy, but by the administratrix of the estate of the deceased whose life was insured, and she seeks to recover the surplus over and above the amount paid to Parker by the company. It is undisputed that Parker was paid, on the death of McKenty, all that he claimed, and he has given a receipt in full of all demands against it, and surrendered the policy.

To sustain the demand made by the administratrix, it is urged that "Parker was a trustee for the estate of McKenty on his death for the amount of the policy, over and above his interest in it (which is said to be the amount of his debt), and that the receipt given by him in full of all demands, and the surrender of the policy can not affect the estate." I do not think the policy upon its face, or the testimony, shows that any one but Parker had an interest in it.

It was possible to effect an insurance so that a portion of the loss would go to the decedent's estate, and to have made the assured named in the policy a trustee to receive it; but there is nothing in the case to indicate that any such purpose was intended.

The plaintiff can not recover, under the assignment from Parker to her, after the latter had been paid by the company the full amount he claimed. At the death of McKenty, the right of action upon the policy belonged to Parker alone. He made his claim, and offered proofs to maintain it, was paid the amount and gave a receipt in full for all demands. That put an end to all his interest in the policy, and it is not possible for the plaintiff, who claims under an assignment made after this receipt was given, to recover anything more from the company.

McKenty v. Universal Life Insurance Company.

See Bliss on Life Insurance, sec. 554. *Rawls v. Life Ins. Co.* 27 N. Y. 282.

JUDGMENT FOR DEFENDANT.

On a motion for a new trial the court gave the following opinion :

NELSON, J.—This case is not to be governed by the common law rule defining what constitutes a good accord and satisfaction.

Parker, the creditor and assured, did not urge a claim for or demand the full amount named in the policy, but agreed, on a sufficient consideration paid him, to exonerate the company from all further liability ; received it, and gave his receipt in full, and surrendered the policy. This, in my opinion, had the effect of an absolute release, as much so as it would have been if a formal instrument had been drawn up and signed and sealed.

The old common law rule of accord and satisfaction was always considered technical, and unsupported by reason. DEWEY, J. in *Brooks et al. v. White*, 2 Metcalf, 283, says : “ The foundation of the rule seems to be, that, in the case of an acceptance of a less sum of money in discharge of a debt, inasmuch as there is no consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made.” This is a rule founded on very poor morals to say the least, and it has been doubted whether it would apply to anything but a bond.

In Coke’s Littleton, 212 b, it is said, that “ where the condition is for payment of twenty pounds, the obligor can not * * * pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum can not be a satisfaction of a greater. But if the obligee do * * *

McKenty v. Universal Life Insurance Company.

receive part, and therefore make an acquittance, *under seal*, in full satisfaction of the whole, it is sufficient, by reason the *deed* amounteth to an acquittance of the whole." Thus we see that the common law rule was intended to secure only a settled and deliberate agreement to discharge the debt. When this appeared and was established, the acquittance of the whole is admitted.

A formal instrument under seal is not the only evidence in my opinion to establish a release. The surrender of the policy in this case by Parker, was, to say the least, *prima facie* evidence of an intention to release all claims under it, and when this fact is conceded, and a receipt in full of all demands is written upon the face of it, and signed by him, I think in law the company is absolutely discharged.

The other point presented, to-wit, that the construction of the contract, so far as the intention of the parties thereto, should have been left to the jury, is not tenable. The policy was the only evidence in the case to indicate what was the intention of the parties. There is no evidence outside to show that the assured was a trustee, and that when his debt was paid he must account for the balance of the amount specified in the policy. The question presented was, "what is the legal construction of the contract?" This the court decided and so charged the jury. Upon the conceded facts in the case, in the view taken by the court, there was no issue of fact for the jury to decide which would authorize a verdict for the plaintiff. See Hare & Wallace's Notes to Smith's Leading Cases, p. 439, 2d volume.

MOTION DENIED.

NOTE.—As to nature of life policies and conflicting decisions as to the continuance of the creditor's interest down to the death, and the extent of recovery, see May on Insurance, secs. 7, 8, 110 and 118. *Phoenix, &c. Ins. Co. v. Bailey*, 18 Wall. 616. Bliss on Life Insurance, secs. 24, 30, 31; *Swick v. Home Ins. Co.* 2 Dillon, 160.

Northwestern Packet Co. v. St. Paul.

THE NORTHWESTERN UNION PACKET CO. v. THE CITY OF ST. PAUL.

1. An ordinance of the city of St. Paul imposing a wharfage tax each trip, upon every boat and vessel landing or anchoring at or in front of the landing or wharf of the city, measured by the capacity of the boat or vessel, not to exceed twenty dollars a trip, is in conflict with the federal constitution and void.
2. A tax thereunder not paid voluntarily may be recovered back.

(Before NELSON, J.)

Wharfage Tax.—Constitutional Law.—Recovery Back of Illegal Tax.

THE plaintiff is a corporation duly organized under the laws of the state of Iowa, and was engaged during the years 1870 and 1871 in running its boats and barges on the Mississippi river for the transportation of freight and passengers. This action is brought to recover money illegally demanded and paid under protest, for the privilege of stopping in the port of St. Paul. The defendant urges that being a municipal corporation, authorized by its charter to build, control, and manage wharves and levees within the city limits, it collected money claimed by the plaintiff by virtue of the following ordinance passed by the city council:

“The common council of the city of St. Paul do ordain as follows:

“That every steamboat or other vessel which may land or anchor at or in front of any landing, wharf or pier within the limits of the city of St. Paul, shall for each and every trip be charged and shall pay the city of St. Paul the sum of four and a half cents per ton for each and every ton such steamboat or other vessel may register or measure: *Provided*, that no boat shall pay more than twenty dollars for each trip, and all boats may remain at the wharf, landing or pier three days from the date of her arrival without extra

Northwestern Packet Co. v. St. Paul.

charge: *Provided*, said boat or other vessel does not interfere with the landing or departure of any other vessel."

And the city alleges that the amount collected was a compensation for the use of the levee or wharf built by the city, and was paid voluntarily by the plaintiff. The suit was tried by the court without a jury.

J. Ham Davidson, for plaintiff.

W. A. Gorman, and *H. J. Horn*, for defendant.

NELSON, J.—The question involved here, aside from that of voluntary payment, is: Does this ordinance of the city of St. Paul conflict with that clause of the constitution of the United States which forbids a state to levy any duty of tonnage without the consent of congress? In the case of *Cannon v. The City of New Orleans* (20 Wallace's Rep. 577), the United States supreme court laid down a rule of decision which covers this case. The New Orleans ordinance charged a rate per ton "on all steamboats which shall moor or land in any part of the port." The ordinance of the defendant fixes the rates per ton on all vessels which may land or anchor at or in front of any landing within the city limits: *Provided*, no boat shall pay more than twenty dollars for each trip. The latter ordinance fixes the tax upon a vessel, whether at a landing or anchored in the middle of a stream in front of a landing, and imposes the tax for the trip. It is, therefore, not a charge for the use of a wharf, but for the privilege of arriving at and departing from the port. The supreme court said, "Whatever more general or more limited view may be entertained of the true meaning of this clause of the constitution, it is perfectly clear that a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving

Northwestern Packet Co. v. St. Paul.

and departing from a port of the United States, is within the prohibition." The ordinance, by its terms, imposes the tax upon every vessel that stops in the port in front of any landing.

The testimony is conclusive that the payment was not made voluntarily. The following notice was served upon the defendant at the time the tax imposed was enforced, and under an arrangement made between the city attorney and the secretary of the company, it was to continue during the year 1870, and was renewed and continued during the year 1871.

"[Name of steamboat.]

"Wharfmaster, etc. Sir: You and the officers of the city under whose direction you act, are hereby notified that the wharfage this day paid to the city by the above named steamboat is paid under protest, and all that may hereafter be paid is here protested against, and the payment is now made and will hereafter be made without waiving the right of the owners of said steamboat to recover the same from the city by an action at law.

"(Signed,)

_____,
"Clerk of steamboat."

The supreme court of the United States, in the tonnage tax case (12 Wall. p. 209), said . . . "If the tax is illegal . . . and paid . . . under protest" or with notice that the party intends to bring "a suit to test the validity of the tax, he may recover it back in such an action." The plaintiff occupies the position defined by the court, and is entitled to recover. Judgment will be entered in its favor and against the defendant for the sum of five thousand nine hundred and seventy-eight dollars and ninety-seven cents, with costs.

[Mr. Justice MILLER, although not sitting in this case, stated his approval of this decision.]

JUDGMENT ACCORDINGLY.

Bradley v. Frost.

NEWTON BRADLEY, Assignee in Bankruptcy of the St. Paul Lumber Company, v. JAMES C. FROST, Sheriff, etc. and CHARLES H. RHINES.

1. A sheriff who sold on execution property previously attached by him by virtue of a judgment of a state court, which made it his duty to sell this specific property, leaving him no discretion, and who in good faith paid over the proceeds of the sale to the judgment creditor, without actual notice of proceedings in bankruptcy commenced after the attachment, but before the judgment and sale, is, *it seems*, not liable as in trover to the assignee in bankruptcy.
2. In such a case, the creditor receiving the proceeds of the sale may be compelled to pay the amount thereof to the assignee in bankruptcy, by an action in the federal court.

(Before DILLON, Circuit Judge.)

Bankrupt Act.—Attachment.—Sale of Property Under State Process.—Liability of Sheriff and Judgment Creditor to the Assignee in Bankruptcy.

THE plaintiff is the assignee in bankruptcy of the St. Paul Lumber Company; the defendants are the sheriff and a judgment creditor of the bankrupt. The action is in the nature of trover to recover the value of certain personal property seized and sold by the sheriff, the proceeds whereof were paid over to the judgment creditor. The facts are these: July 22, 1875, the creditor sued the St. Paul Lumber Company in the state court and attached the property in question. August 25, petition in bankruptcy filed against the St. Paul Lumber Company. September 6, judgment entered in the state court against the attachment defendant (the St. Paul Lumber Company), but without any special order to sell the attached property. September 17, writ of execution on the judgment levied by the sheriff on the property theretofore attached. September 23, the original judgment plaintiff (Parker) assigned the judgment to the defendant Rhines. September 8, the St.

Bradley v. Frost.

Paul Lumber Company was adjudicated a bankrupt on the creditors' petition of August 25, and on September 29, the register's deed of assignment to the plaintiff was executed and delivered. October 4, the sale of attached property was made by the sheriff, and the proceeds paid over on the execution to Rhinea. This was done without *actual* notice of the bankruptcy proceedings. No application was made by the assignee at any time to the state court. After the sale by the sheriff and payment of proceeds to the judgment creditor, the assignee in bankruptcy made a written demand (October 15) on the sheriff for the property, but not for the proceeds thereof, and afterwards brought this suit against the sheriff and the assignee of the judgment who received the proceeds of this sale, to recover the value of the property, alleging, however, that it sold for its full value, and not seeking to recover any more than it brought at the sheriff's sale. The case came before the court on a motion by the plaintiff for judgment on the defendant's answer, which set up the foregoing facts.

H. L. Williams, for the plaintiff.

Lochran, McNair, & Gilfillan, for the defendants.

DILLON, *Circuit Judge*.—1. The suit in the state court was commenced and the writ of attachment levied on the property of the debtor before the proceedings in bankruptcy were commenced, and judgment was regularly obtained two days prior to the time when the debtor was adjudicated to be a bankrupt. The adjudication of bankruptcy, however, preceded the issuing of the execution. When the assignment was made to the plaintiff, the title to the property vested in the assignee and related back to August 25, when the proceedings in bankruptcy were commenced. No question is made as to the regularity and validity of the judgment, and it is admitted that by the laws and practice

Bradley v. Frost.

in Minnesota, property attached is held under a general judgment, and that it was the *duty* of the sheriff having an execution issued on the judgment to sell the attached property the same as if the judgment of the court had specially directed this to be done. (Rev. Stats. of Minn. 468, sec. 139.)

Accordingly the property was sold by the sheriff on the execution, and the proceeds paid over by him to the judgment creditor, without actual knowledge of the proceedings in bankruptcy. As respects the sheriff, the case is to be treated as one in which the attachment was rightfully levied in the first instance and the property thereby brought within the possession of the state court by being in possession of its officer. (*Johnson v. Bishop*, Woolw. 324.)

The judgment rendered by the state court, so counsel concede, bound the property attached to the same extent as if it had by the court been specially so ordered, and the sheriff, when the execution on the judgment was in his hands, was bound to sell the property attached, the same as if the writ of execution had specially commanded this to be done. This he did, and made the sale, and paid over the proceeds to the judgment creditor, before actual knowledge of the proceedings in bankruptcy.

Under these circumstances, it admits of great doubt whether the sheriff can be held in this action for the value of the property sold (*Johnson v. Bishop*, *supra*; *Buck v. Colbath*, 3 Wall. 334, 343), and, as at present advised, I shall deny the motion for judgment against him; reserving the case for further consideration, if necessary, on this point.

2. As respects the judgment creditor who received the proceeds of the sale, I am of opinion he is liable. The effect of the adjudication in bankruptcy and the subsequent assignment to the plaintiff, was to dissolve the attachment (sec. 14 of the bankrupt act), and to transfer the title to the attached property to the plaintiff, as of the date of the com-

Minnett v. Milwaukee & St. Paul Railway Co.

mencement of the proceedings in bankruptcy. The attachment being dissolved, the rights of the judgment creditor, as respects the assignee, must rest upon the sale under the execution, and the rights under the levy of the execution, if any were acquired, were divested by the subsequent deed of assignment to the plaintiff. The title to the property at the time of the sale was wholly in the plaintiff, and the judgment creditor has no greater right to the proceeds of the sale than the bankrupt had in the property, that is to say, no right whatever.

If the plaintiff so elects he may have judgment on the pleadings against Rhines for the net amount he received of the sheriff. If he does not so elect, his motion for judgment on the pleadings will be denied, and he may contest the facts set up in the answer.

[The plaintiff elected to take judgment for the amount received of the sheriff.]

JUDGMENT ACCORDINGLY.

NOTE.—See *Townsend v. Leonard*, ante.

JOHN MINNETT v. MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. The act of March 2d, 1867, as to the removal of suits from the state to the federal court, although technically repealed by the revised statutes, is therein substantially re-enacted, and a party on complying with its provisions is entitled to a removal of the cause.
2. The president, and perhaps, the general manager of a railway company, is *prima facie* entitled to make the required affidavit in such a case.
3. Such application may be made after a new trial on the merits has been granted and before the new trial has been commenced.

Minnett v. Milwaukee & St. Paul Railway Co.

(Before NELSON, J.)

Removal of Suits from State to Federal Court.—Local Influence and Prejudice.—Who may Make Affidavit.—Final Trial.—Time of Application for Removal.

THE plaintiff brought his action in the state district court; and after a trial upon its merits and a verdict in his favor, the court, upon the defendant's motion, granted a new trial, for reasons, as stated, that "said verdict is not justified by the evidence and is contrary to law."

The defendant on February 13th, 1875, presented a petition for the removal of the case to the United States circuit court, embodying the substance of the language of the third subdivision of section 639, United States Revised Stats. p. 113, except that it states that there has been "no final hearing or trial of the cause." The proper security was offered, and the affidavits of the president of the company defendant, and its general manager, were made and filed at the time of filing the petition. The defendant's attorney, after these steps had been taken, served a notice upon the attorneys for the plaintiff of a motion before the state district court for the removal of the suit. In this notice he states that the defendant has filed the affidavit provided for by an act of congress approved March 2d, 1867. The motion came before the court, and after counsel for the plaintiff and defendant had been heard, the removal was ordered February 23d, 1875. The plaintiff now moves before this court for an order remanding the suit, for the reasons:

I. "Because said cause was sought to be removed under act of 1867, ch. 196, which act was not in force at the date of the presentation of the petition for said removal, and of the order granted thereon.

II. "Because the petition, affidavit and bond presented to the state court were not drawn, executed or approved under or by virtue of any law of the United States in such case provided, in force and effect at said date."

Minnett v. Milwaukee & St. Paul Railway Co.

III. "Because no removal can or could be had of said cause after a trial thereof upon the merits."

Other reasons were urged, but they are substantially embodied in those above given.

E. C. Palmer, for the motion.

Gordon E. Cole, *contra*.

NELSON, J.—I. If the defendant complied with the law in force at the time it presented the petition, affidavits and security, it was entitled to have the suit removed, and the judge of the state court had no discretion in the premises. The petition makes no allusion to any particular act of congress, but states that the petitioner is a citizen of the state of Wisconsin, and the plaintiff a citizen of the state of Minnesota; alleges the amount sought to be recovered sufficiently large to give the federal court jurisdiction, and in terms embraces all that is set forth and necessary to be done under the third subdivision of section 639, Revised Statutes.

These statutes embrace all the laws in force December 1, 1873, as revised and consolidated; and sec. 639 contains all the provisions of the several previous acts relating to the removal of suits from the state to the federal court. The only change made is in the act of 1867, by transposition of the words in the phrase, "at any time before the final hearing or trial," so as to read, "at any time before the trial or final hearing."

The notice of the motion which was served upon the plaintiff's attorney states that the removal is demanded under the act of 1867, which was technically repealed at the time the defendant presented its petition. The right of removal, however, does not depend upon the contents of the notice of the motion for removal; and the state court, as before stated, could not withhold the removal if the exist-

Minnett v. Milwaukee & St. Paul Railway Co.

ing law in regard to the petition, affidavits, and security was complied with. This court is also bound to retain jurisdiction of the suit under such circumstances.

2. In my opinion, the allegation in the petition, that there has been no *final hearing* or trial of the cause, is a compliance, substantially, with the third subdivision of sec. 689, which gives the right of removal at any time before "the trial or final hearing;" and corporations being within its purview, any proper officer — particularly the president, who is the head of the organization — could make the requisite affidavit.

3. The other question necessary to be determined, is whether, there having been a trial upon the merits, the defendant is entitled to a removal of the action, a new trial having been granted. The statute requires the petition to be filed before "the trial or final hearing of the cause;" and it is urged that a trial on the merits prevents the removal of the case. "The trial" mentioned in the act, in my opinion, means, not *one trial*, or *a trial*, but a determination of the rights of the parties forever. When a new trial was granted, the suit was in the same position that it would have been had no trial taken place; the first trial had been erroneous — it had not been in accordance with the law, and there had been no such examination of the rights involved as was contemplated by congress in using the word "trial." Again "the trial" mentioned in the act means a final investigation of the rights involved in the court of original jurisdiction.

The terms "the trial," and "final hearing" are used by congress as having a relative connection — a reciprocal meaning — the former applicable to actions at law, and the latter to equity cases. The word "suit" embraces actions at law as well as equity cases, and the conjunction "or" connecting the words "the trial" and "final hearing" is used, as it often is, where it is sought to give an explana-

Minnett v. Milwaukee & St. Paul Railway Co.

tion or definition of the same thing in different words. Such must be the true construction of the law, for it is hardly probable that a distinction would be made between actions at law and equity causes, which would present a strange anomaly as suggested by Mr. Justice SWAYNE in *Ins. Co. v. Dunn* (19 Wall. 225) that "in equity cases a final hearing only could take away the right of removal, while any trial, however interlocutory in its character, should have the same effect in an action at law." To avoid this the supreme judicial court of Massachusetts in *Galpin v. Critchlow* (13 Am. Law Reg. p. 137, N. S.) construing the law of 1867, which used the language "before the final hearing or trial," said the "*trial* appropriately designates a trial by jury of an issue which will determine the facts in an action at law, and *final* hearing, in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity."

The supreme judicial court of New Hampshire, in *Whittier v. Hartford Ins. Co.* (14 Am. Law Reg. N. S. 621) agree to the judgment in the Massachusetts case, and consider the reasoning in that applicable to the law as it appears in sec. 639, par. 3. With great respect for these courts, I cannot agree to their interpretation of the statute. In equity practice the term *hearing* has a well defined meaning, viz: "that stage or proceedings in an equity cause which corresponds to a trial of a cause at law; the hearing of counsel upon the pleadings and proofs." The qualifying adjective *final* makes this *hearing* one that absolutely ends the matter in dispute, and is explanatory of the words "the trial." This case is certainly within the spirit of the law, and in my opinion within its letter.

The motion to remand is denied.

MOTION DENIED.

NOTE.—Subsequently another ground was taken before the circuit judge, on which to remand the cause, viz: that the Milwaukee & St. Paul Railway Company was a *domestic* corporation of Minnesota, but

Patterson v. Boom Company.

on examining the pleadings and the legislation of the state applicable to the question the court overruled the objection, referring to the case of *Williams v. Missouri, Kansas & Texas Railway Co. ante*, p. 267, and the cases there cited

See *Farmers Loan & Trust Co. v. Maquillan, ante*, p. 379.

WM. C. PATTERSON v. MISSISSIPPI & RUM RIVER BOOM CO.

1. A suit pending in a state court, between a land owner and an incorporated company, seeking to appropriate his private property under the right of eminent domain, where the question to be tried is the value of such land, is a suit of such a nature as *may be removed* to the federal court, although the proceeding in its inception was an appraisalment by commissioners appointed under the charter of the company.
2. The legislature may constitutionally authorize the *fee* of private property to be *taken for a boom*, to be built and operated by an incorporated company over which, and its charges, legislative control is reserved.
3. Measure of damages where property is appropriated for boom purposes—see note.

(Before MILLER, DILLON and NELSON, JJ.)

Boom.—Eminent Domain.—Removal of Suits to the Federal Court.

A STATUTE of the state of Minnesota incorporated a boom company and authorized it to exercise the right of eminent domain for the appropriation of land necessary for its business. (Special Laws 1867, p. 355, sec. 13.) The act provided for the appointment of three commissioners by the district court or judge, who, upon notice, were to make the assessment of damages and file the award in the office of the clerk of said court. The act gives either party the right to appeal from the award to the district court. Upon such appeal being taken the statute directs the clerk to "enter the appeal as a case upon the docket of said court, the land

Patterson v. Boom Company.

owners being set down as plaintiffs and the boom company as defendant; and the court shall proceed to hear and determine such case in such manner as other cases are heard and determined; all issues of fact to be tried by a jury, unless a jury be waived by both parties," the jury, or court, if a jury is waived, shall assess the land at the time the same is entered upon and taken by the company. The statute directs how judgment shall be entered and gives either party the right to a change of venue and provides that "the judgment of the said court may be reviewed on writ of error, as other cases at law."

After an award of damages had been made under the statute and an appeal taken to the state district court and the case duly docketed, the land owner, who was a citizen of another state, made due application for the removal of the case to the circuit court of the United States, and the removal was ordered. In the circuit court the boom company made a motion to remand the case, on the ground that such a case was not removable.

Lochren, McNair, & Gilfillan, for the motion.

Bigelow, Flandrau, & Clark, opposed.

Per CURIAM (MILLER and NELSON, JJ).—1. Under the charter of the boom company, the mode of appropriation of lands is particularly prescribed. At the time when the removal was applied for, the controversy between the boom company and the land owner had assumed the shape of a suit docketed and pending as an action at law in the state court, and, in our judgment, it was such a *suit* as might be removed under the act of congress in that regard.

2. In view of the large logging and lumber interests of the state on the Mississippi river and of the necessity for booms, and of the special provisions of the charter of the boom company reserving legislative control over the said

Patterson v. Boom Company.

company and its tolls and charges, this court cannot hold that it was beyond the legislative competency to authorize the boom company compulsorily to acquire, on making compensation therefor, "such lands as may be necessary for properly conducting the business as herein authorized and required."

3. Conceding that the charter of the boom company authorizes the appropriation *in fee* of the lands of others to its own use, it is not for that reason unconstitutional. (Dillon, Munic. Corp. sec. 456, and cases cited.)

NOTE.—Subsequently, on the trial before a jury, the Circuit Judge (NELSON, J. concurring) charged as follows:

1. The only question for you to determine is, what is the just and fair value of the land of Patterson which the boom company is seeking to appropriate for its use? The case is peculiar in some of its features, and makes the determination of the value of the lands somewhat difficult. The lands in question, 34 46.100 acres, comprise all of one island and part of two other islands in the Mississippi river. The main channel of the river is on the east of these islands and the space on the left of the islands (about one-eighth of a mile wide), is what is known as a slough and is conceded to be well adapted to the making of a boom for logs coming down the river.

[The charge of the court, after referring to the chartered franchises of the boom company, proceeded as follows:]

2. The boom company in this case propose to appropriate *all* the land of the plaintiff on these three islands, and hence there is no embarrassment arising from the effect of the taking of only *part* of the land upon the value of the part remaining in the owner. Where all of the land of a private owner is taken for public purposes, as in this case, the owner is entitled to the fair and full pecuniary value of the property at the time it is taken, no matter what may have caused that value. The owner is entitled not simply to such sum as the property would bring at forced sale, but such sum as the property is worth in the market, that is to persons generally, if those desiring to purchase were found who were willing to pay its just and full value, and he is entitled to no more. (Dillon, Municipal Corp. sec. 487, and cases cited.)

Neither the plaintiff nor any other person, without legislative authority, has the right to sink piles or make a boom in the Mississippi river, which would obstruct any part of its navigable surface. Aside from that, the charter of the boom company, above referred to, gives it

Patterson v. Boom Company.

the right to establish a boom within the limits fixed in its charter within which limits lie the lands of the plaintiff. There cannot be two concurrent rights in different persons to make a boom at one and the same place in the river. It therefore follows that the plaintiff could not himself use his islands for boom purposes; and hence he is not to be allowed, as an element of damages, that he is deprived of the right to use them in this manner.

The right of the boom company to use the islands when acquired, in connection with their other property, for boom purposes, is a franchise conferred upon the company, and upon no one else, by the legislature, and therefore it is not proper for the jury to allow what the islands when acquired by the company will be made worth to the company by reason of the legislative franchise above mentioned.

While this is so, it is yet true that if these islands are particularly adapted for boom purposes, and if this adaptability is an element which creates an additional demand for these islands and confers upon them an additional value, this may and should be considered by you in ascertaining the value of the plaintiff's lands.

3. This question of value is one for the jury to determine upon the whole evidence and all the circumstances of the particular case, guided by the rules of law above stated. It is the universal experience of courts that where any fact depends upon the *opinions* of witnesses, these opinions are generally found to be variant and conflicting. This case affords a striking illustration of this observation. Witnesses professing to be conversant with the value of such property vary in their estimates of the value of the plaintiff's islands all the way between \$300 and \$20,000 or \$30,000. Some of these opinions must be wrong and of little value, and all of them may be mistaken opinions. You must form *your own judgment* upon all the facts before you (including, of course, for what they are worth, the *opinions* as to value of the various witnesses). It is your judgment that must govern. You may fix upon or adopt, if you think it just, the value heretofore fixed by the commissioners, or a greater or less value. If there have been sales of these islands or of other islands similarly situated and adapted to the same uses, or contracts with land owners, by the boom company, for the use of other lands in the vicinity for boom purposes, these may be resorted to by you looking at all the circumstances of these sales and contracts, in the determination of the ultimate question of value, and, ordinarily, actual sales or transactions are better evidence of value than the mere opinions of witnesses on the subject, especially where the value concerns property for which there is not a market demand, or a known or easily ascertainable general value.

[The jury returned a verdict for over \$9,000, which was reduced, as a condition of denying a motion for a new trial, to \$5,500, but the boom company, nevertheless, sued out a writ of error.]

REPORTS
OF
CASES DETERMINED
IN THE
Circuit Court of the United States,
FOR THE
DISTRICT OF IOWA.

SAMUEL DOLTON *v.* L. B. NELSON AND THOMAS A. GRAHAM.

1. The provision in the statutes of Iowa that "administration shall not be *originally* granted after the lapse of five years from the death of the decedent," etc., does not apply to an administration which is merely *auxiliary* to one originally granted in another state, and hence such administration may legally be granted and an administrator appointed after the lapse of five years.
2. Under the circumstances, a sale of real property by an administrator was held valid upon *notice* of the petition to sell; served upon the widow and heir of the intestate, although they had before that time, but after the appointment of the administrator for the purpose of having the land subjected to the payment of debts, conveyed the lands to a third person, who was not notified of the petition of the administrator to sell.
3. Whether *notice* to the heir or his grantee of an administrator's petition to sell real estate of the intestate is in any case jurisdictional and essential to the validity of an administrator's sale in Iowa, *quære*. See *Good v. Norley*, 28 Iowa, 188, and cases cited.

(Before MILLER, Circuit Justice.)

Dolton v. Nelson.

Administrator's Sale.—Notice.—Jurisdiction.—Original and Auxiliary Administration.

IN equity. On final hearing on bill, answer, cross-bill, and proofs. The bill was brought to quiet title. No question arose concerning the frame of the bill or the equity jurisdiction. The necessary facts appear in the opinion of the court.

Brown & Campbell, for the plaintiff.

James T. Lane, for the defendant.

MILLER, *Circuit Justice*.—Two questions are presented by this record, neither of which is free from difficulty, and both dependent upon the construction of Iowa statutes on points which have not been decided by the supreme court of the state.

I. Both the parties claim under Pendergrast, who died the owner of the land, and intestate, domiciled at the time in the state of New York. Plaintiff claims by conveyances from his heirs, and defendant, Nelson, by purchase at an administrator's sale. If this latter was valid, then defendant must succeed, but it is charged that the grant of administration was void under sec. 2357 of the Iowa revision of 1860, and that if this point be not sound the sale was void for want of notice of the application to sell. That section, which was also a part of the code of 1851, enacts that "administration shall not be originally granted after the lapse of five years from the death of decedent, or from the time his death was known, in case he died out of the state." Pendergrast, the intestate, died in the state of New York, on the 9th day of March, 1863. Administration was duly taken out in that state shortly after and on the 18th day of May, 1868, a petition was filed in Tama county, Iowa, for the appointment of an administrator here, and Graham was appointed on the 28th

Dolton v. Nelson.

of that month. It will thus be seen that more than five years had elapsed from the death of decedent in New York before any movement was made to appoint an administrator in Iowa. But it is claimed that the administration in the state of New York was the *original* one and that the Iowa administration was auxiliary to it and is not original within the meaning of the statute. This view receives support from other parts of the same chapter, on the estate of decedents, in which it is provided that where an administrator has been appointed in another state, where the decedent resided, such administrator may be appointed on his own application in Iowa, but in order that this may be done sec. 2342 requires that "the original letters testamentary or of administration, or an attested copy thereof," must be filed in the office of the probate court here. We have here in the same statute, only a few sections apart, the only other use of the word "original," as applied to letters of administration.

The case before us comes very nearly within the precise terms of the section last cited, for though Graham, the administrator in Iowa, was not the person who was administrator in New York, he was appointed at the request and on the petition, in writing, of the New York administrator, setting out that there were assets in Iowa necessary to pay the debts of the decedent, those in New York being exhausted. I am therefore of opinion that the appointment of Graham was not an original administration, and that it was a valid appointment.

II. The question of notice raised by plaintiff is based upon the fact that on the 5th day of March, 1869, the heirs of Pendergrast sold and conveyed the land to Maunsell F. Miller, who afterwards sold and conveyed to plaintiff, and that the petition to the county court for the sale of the land was filed on the 12th of March, some days after that sale. And the only notice of the application to sell was served

Dolton v. Nelson.

on the widow and daughter, the heirs aforesaid of the said Pendergrast, a few weeks later; the said Miller, who, then had the legal title, not being served at any time.

A question somewhat similar to this came before the supreme court of Iowa, in *Good v. Norley*, 28 Iowa, 188, in which the judges of that court were equally divided. The question there was, whether a sale was void where no notice had been served on the infant heir, but for whom a *guardian ad litem* had been appointed and appeared, and the question arose between the purchaser, at the administrator's sale, and this minor heir. I think that whatever may be the rule in such cases, that when a party in good faith and for value without notice of any debt or proceeding to subject the land to its payment, buys of the heirs, an administrator's sale without any notice of the proceedings to such a party, presents a stronger case for denying its validity than in case of the heir. The latter takes *ex gratia*, pays nothing, parts with nothing and by the law of the land inherits subject to the payment of debts. The other parts with his money for a title which is certainly in the heir, and which seems to be clear and valid if he has no notice, actual or constructive. I should feel strongly inclined in such a case to protect the purchaser, as the holder of the better title. But that is not this case. Mrs. Pendergrast was one of the administrators in New York, and joined in the application to have Graham appointed auxiliary administrator in Iowa. In the petition for his appointment, filed on the 18th day of March, 1868, it is alleged that all the assets in New York had been exhausted, that the decedent died owning lands in Tama and other counties in Iowa and prayed for the appointment of an administrator, and *that those lands might be subjected to the payment of debts yet unsatisfied*. This was a public record, part of the proceeding, by which the land was finally subjected to sale, and I think Miller was bound to take notice of it when he took his deed, knowing

Dolton v. Nelson.

as he did that his vendors held as heirs to Pendergrast and that the law made the title in their hands liable by a proper proceeding to the debts of the decedent. It was not requiring too much of him to ascertain if there was any administration in the county where the lands lay, and if so, were there any debts unpaid, or any step taken to subject the lands to such debts. If he had made this inquiry at the proper place he would have seen that there were debts unpaid and that for the very purpose of subjecting these lands to their payment an administrator had been appointed nine months before. When we reflect that the deed to Miller was dated on the 8th of March, 1869, that the petition for the sale of the lands were filed four days thereafter, that Mrs. Pendergrast must have known of the intended application to sell, we must believe that the purpose was to defeat the sale or render it invalid, and this, coupled with Miller's carelessness about the record in Iowa, goes far to prove that he knew of this purpose and was willing to aid in it. Under these circumstances I do not think he was entitled to be served with notice of the petition to sell, and that the notice having been served on the party who might well be presumed to have the title, the sale is valid against Miller, who was not a purchaser without notice in the proper sense of that term.

The plaintiff's bill must be dismissed with costs, and defendant's title quieted and confirmed on his cross-bill.

DECREE ACCORDINGLY.

NOTE.—An appeal was prayed and allowed.

As to validity of administrator's sales: *Cornett v. Williams*, supreme court United States, October term, 1873, 20 Wall. 226.

Nazro v. Cragin.

JOHN NAZRO, Plaintiff in Error, v. ALONZO CRAGIN, Defendant in Error.

1. The provision in section 11 of the judiciary act of 1789, that no civil suit shall be brought by original process in the federal court in any other district than that of which the defendant is an inhabitant, or in which he shall be found at the time of serving the writ, is not repealed by the bankrupt act, nor by section 6 of the act of June 1, 1872, in respect to the attachment of property (17 Stats. at Large, 196).
2. Objection to the jurisdiction may be taken by *motion*, and is not waived by subsequently pleading to the merits.
3. Under the statute law of the state of Iowa, and the practice of the state courts therein, motions are parts of the record, and rulings thereon may be reviewed on error. Section 5, of the act of June 1, 1872, makes this practice applicable in the federal court on a writ of error to the district court, whose ruling on a motion to the jurisdiction may be reviewed.

(Before MILLER, Circuit Justice.)

Attachment of Property.—Jurisdiction.—Act of June 1, 1872.
—Motions.—Error.

CRAGIN, as assignee in bankruptcy of Field & Field, bankrupts, brought an action at law in the district court of the United States for the district of Iowa (by which he was appointed such assignee), against John Nazro, a citizen of Wisconsin, to recover an alleged claim against him. The petition asked the auxiliary process of attachment against the property of the defendant, and contained the necessary averments under the laws of the state for that purpose. An attachment bond was filed and a writ of attachment issued, which was levied upon property of the defendant, found within the district of Iowa. The defendant was not found within the district of Iowa, nor was he a resident or citizen thereof, and no summons was served upon him therein. But the defendant, by his counsel, made a *special* appearance in the district court and filed a *motion* therein to dismiss the suit and all proceedings for want of jurisdiction of the court

Nazro v. Cragin.

over his person and property. The court overruled the motion, to which the defendant excepted. The defendant thereupon answered the petition, and, subsequently, there was a trial resulting in a judgment in favor of the assignee. The defendant brought the cause into this court by writ of error.

Thos. Updegraff, for the plaintiff in error (Nazro).

Shiras, Van Duzee, & Henderson, for the assignee (Cragin).

Mr. Justice MILLER, orally delivered the opinion of the court, in substance, as follows :

The eleventh section of the judiciary act contains the provision that "No civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving the writ."

The jurisdiction of the district court over the defendant, who was neither a citizen of Iowa, nor found therein, cannot therefore be maintained unless by some subsequent act of congress repealing the above restriction. It is urged that jurisdiction in such cases is conferred by the bankrupt act. Undoubtedly this act does, in certain cases, confer jurisdiction by reason of the subject-matter and irrespective of the citizenship of the parties. But I can discover nothing in the act which gives to the assignee in bankruptcy the power to sue in the federal courts a non-resident of the state upon whom no personal service within it can be had. The restriction in the judiciary act, mentioned above, is not repealed by the provisions of the bankrupt act.

It is next urged that the jurisdiction asserted by the district court is conferred by section 6 of the act of June 1, 1872 (17 Stats. at Large, 196). But in my judgment this is

Nazro v. Cragin.

a mistaken notion of the design of this section. It does not repeal the limitation in the judiciary act. Prior to the legislation of 1872, just noticed, the federal courts had, *by rule*, generally adopted the state laws as respects attachments of property, but it was never supposed that jurisdiction could be exercised without personal service on the defendant, made within the district. The statute of 1872 adopts existing provisions of the state laws in this regard and gives the court power, by rule, to adopt provisions subsequently enacted by the states; but, in my opinion, it was not intended by congress to make the great change for which the assignee's counsel here contends. It would compel citizens of the Pacific coast to go to New York to defend their property which happened to be there and would give the great central cities vast power. I cannot but think that a change so radical would have been expressed by congress in unmistakable language. And this view is strengthened by the consideration that no publication is provided for by the section under consideration, while a subsequent section of the same act does provide for publication in respect to certain suits in equity.

The effect of this section in the act of 1872 is simply this: If the court has or can acquire jurisdiction over the defendant personally this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction.

Another question is this: Nazro appeared specially in the district court and by *motion*, instead of by plea, objected to the jurisdiction of the court. The objection was overruled. By the laws of the state and practice in the state court motions are part of the record. When the motion of the defendant to the jurisdiction was denied, he then answered and defended, and judgment went against him, to reverse which he brings this writ of error.

I am of opinion that, though a *plea* to the jurisdiction

 Chandler v. Siddle.

would have been more regular, yet, under section 5, of the act of June 1, 1872, the ruling of the district court on the motion is part of the record and may be reviewed here the same as if a plea to the jurisdiction had been overruled. I am also of opinion that the ruling on the motion to the jurisdiction was not waived by afterwards pleading to the merits, and that it is available to the defendant on error. Accordingly the judgment below must be reversed, and the district court directed to dismiss the proceedings.

JUDGMENT ACCORDINGLY.

GEORGE CHANDLER, Receiver, etc. v. A. SIDDLE.

1. The bankrupt act does not furnish the sole remedy for winding up insolvent corporations or companies.
2. Power of a receiver to sue in the courts of another state considered.
3. A call or assessment, or some equivalent action, held essential to the liability of the defendant on his contract to purchase shares of stock in an incorporated company.

(Before MILLER, Circuit Justice.)

Bankrupt Act.—Insolvent Corporations.—Receiver's Power to Sue.—Liability of Stockholder.

ACTION at law. The plaintiff alleges that he is the receiver of the Lamar Insurance Company, of Illinois, appointed by a court of chancery, in Chicago, in a suit in which two persons who are named were plaintiffs, and the said insurance company was defendant—the exact nature of which does not appear. It is alleged that the said company had, before said suit in Illinois was brought, become insolvent and ceased to do business.

The petition herein also alleges that on August 15, 1873, the said court of chan in cerysaid cause made an order as

Chandler v. Siddle.

follows: "And the said receiver is hereby authorized and empowered to compromise with any one or more of the stockholders of the said corporation, defendant, and to take and receive from him or them such sum of money or such percentage on the amount due from such stockholders as in the judgment of said receiver will be just and equitable, and a fair proportion for such stockholder to pay toward discharging the debts of the corporation. And upon such payment and settlement said receiver is hereby directed to give up and surrender to the party or parties so paying, the stock, bond, or obligation of said parties, and to release and discharge the same. And it is further ordered, adjudged and decreed that in case said receiver shall bring any suit to enforce the payment of any stock or other obligation due to said corporation, he shall bring said suit for and enforce such claim for the full amount of the debt or demand due, and the said decree of this court entered on the 18th of January, 1873, and the matters therein contained, so far as the same relate to the assessment of twenty per cent, the call of fifteen per cent, and the collection of such per cent, and call, be and the same is hereby, as to all future and further proceedings, vacated and declared to be of no force or effect, and said decree shall not operate as a bar to such recovery, nor shall said decree, or the matters therein contained, defeat or bar any suit which said receiver may hereafter bring to enforce payment of any debt due to said corporation."

The present suit is brought by the receiver to collect eighty per cent, the balance alleged to be due from the defendant on a contract to purchase ten shares of stock in the said insurance company. The contract is in writing, and is in substance that the defendant promises to pay for said stock, \$1,000, in this manner: five per cent down, and three installments of five per cent, in three, six and nine months. "The balance being subject to the call of the di-

Chandler v. Siddle.

rectors as they may be instructed by majority of the stockholders represented at any regular meeting." It is this balance that the receiver seeks to recover. The charter of the company is not set forth in the pleadings, nor the powers and authority of the receiver, otherwise than appears above.

The defendants demurred to the petition, and, on argument, the points below mentioned were ruled.

Parker & Twomey, for the receiver.

James T. Lane, Gatch, Wright & Kennedy, for the defendant.

MILLER, *Circuit Justice*, orally delivered the opinion of the court, holding :

1. That proceedings in bankruptcy are not an exclusive method of winding up insolvent corporations or companies. The bankrupt act does not, *ipso facto*, suspend state laws for the collection of debts. The act of congress of February 13, 1873 (17 Stats. at Large, 436), is a complete answer to the position that the sole remedy against an insolvent insurance company is in the bankruptcy court.

2. It is, perhaps, true, that where duly appointed and authorized, a receiver may, ordinarily, sue in another state. This power, when it exists, arises from comity, in the absence of special statute regulations, and it is, in general, subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought. The effect of the bankrupt act on the general doctrine does not arise on the record before me. And in view of the uncertain nature of the proceedings in which the present plaintiff was appointed, I give no definite opinion concerning his powers in respect of suits brought in this district. See *Booth v. Clark*, 17 How. 322.

3. In this action *at law*, in which neither the corporation nor its stockholders other than the defendant are before the

Allison v. Phoenix Insurance Company.

court, and in which the suit is on the contract of subscription for the entire eighty per cent alleged to be due, I am of opinion, considering the terms of that contract, and that no call or assessment is alleged, either by the company before the insolvency or by the court since, that the petition does not state a cause of action. In other words, in this action at law on the contract, there must be a call or assessment, or something standing in the place thereof, and equivalent thereto, either by the company or by a proper court, in order to make the defendant liable. This does not appear either by the averments of the petition or on the exhibits thereto, and hence the demurrer must be sustained, but the plaintiff may amend, and, in doing so, I advise him to set forth the charter of the company and the nature of the chancery proceeding in Illinois.

ORDERED ACCORDINGLY.

B. F. ALLISON v. PHOENIX INS. CO. OF BROOKLYN.

1. A second fire policy invalid by reason of misrepresentation as to prior insurance, does not constitute additional insurance within the meaning of the usual condition against other insurance contained in a prior policy, in another company.
2. *Carpenter v. Providence Insurance Company*, 16 Pet. 495, distinguished.
3. Whether a second valid insurance on furniture not notified to the company issuing the first policy, which covered other property separately valued, as well as furniture, avoids the first policy *in toto*, or only as to the furniture, *quære?* See cases cited.

(Before DILLON, Circuit Judge.)

Double Insurance.—Notice.—Entirety of Policy Covering Distinct Property Separately Valued.

THIS is an action on a fire policy to recover \$2,000, the amount insured by the defendant upon the plaintiff's stock

Allison v. Phoenix Insurance Company.

of goods. The written portion of the policy, which was dated February 7, 1870, and expired in one year, is as follows: \$2,000 on his stock of dry goods, boots and shoes, and groceries; \$200 on his household goods and furniture, in a one story wood building, 20 x 52, on lot 1, blk. 18, town of Ogden, Iowa. On the 18th day of June, 1870, the agent of the defendant indorsed on the policy: "Permission is hereby given by the Phoenix insurance company to B. F. Allison to *transfer* his stock of goods and furniture to *Grand Junction*, Iowa, to be kept in a one and a half story wood building, 22 x 36 feet, detached." The transfer was made accordingly.

The defendant's policy contains the following provision: "If any other insurance has been or shall hereafter be made *upon the said property* and not consented to by this company in writing hereon, this policy shall be null and void." On this provision a special defense was made by the company which set up (4th count of answer) that the plaintiff, without its consent, had procured "other insurance," to-wit: "\$200 in the Hawkeye company," on his *household furniture*, being part of the property covered by the defendant's policy. The facts in this respect appear in the special verdict, hereafter set forth.

The jury found against the company, on the other defenses, and rendered a general verdict for the plaintiff for \$1,500 (the value of the stock of goods consumed), subject to the rights of the parties on the facts found in the *special* verdict, which is as follows:

Special verdict.—"We find that the foregoing verdict for the plaintiff is subject to the right of the parties upon the following special verdict as to the defense set up in the fourth count of the answer in respect to other insurance, to-wit: After the policy in suit was issued, and before the fire, to-wit, on the 29th of November, 1870, and after the property mentioned in the policy in suit was removed to Grand

Allison v. Phoenix Insurance Company.

Junction, under the permission indorsed on the policy, the plaintiff herein applied to the Hawkeye insurance company for insurance, and on November 29, 1870, the said Hawkeye company issued to the plaintiff a policy of Insurance of that date for one year, whereby, in consideration of \$12.50, said Hawkeye insurance company insured the plaintiff against loss or damage by fire, as follows: "\$500 on his frame store and dwelling house in Grand Junction, and \$200 on his *household furniture*, and \$75 on his general library contained therein," and delivered said policy to the plaintiff and said policy remained in force until after said house and furniture and library were destroyed by fire. The said store and house thus insured by the Hawkeye company are the same building into which the defendant gave the plaintiff permission to move the goods and household furniture mentioned in the policy in suit. Said store and dwelling house were all under one roof, and so was the "one story wood building," at Ogden, mentioned in the policy in suit.

Said policy issued by the defendant, and said policy issued by the Hawkeye company, and the respective applications by the plaintiff for insurance to the said companies are annexed as part of this special verdict. The same fire totally consumed the building, the stock of goods therein, and all the household furniture. When plaintiff removed to Grand Junction he took his stock of goods and most of his household furniture with him, but after such removal and before taking out the said policy in the Hawkeye company, he had made some additions to his household furniture.

[In the written application to the Hawkeye company, the plaintiff, in answer to a question, said there was no insurance on the building or household furniture.]

The jury submit to the court, as a question of law under the pleadings, whether the above facts constitute a defense

Allison v. Phoenix Insurance Company.

to an action on the policy in suit for the value of the stock of dry-goods insured in said policy? If they do, then the jury find for the defendant, if not, they find a general verdict for the plaintiff, for the amount named therein; to-wit, \$1,500."

The application for insurance in the Hawkeye company stated incorrectly that there was "no other insurance on the household furniture." The Hawkeye policy contained a condition "that any other insurance on the property hereby insured, or any part thereof, not notified to the company, should avoid the policy." The Hawkeye company had no notice of the prior insurance in the defendant company on the furniture; nor did the defendant company have notice of the subsequent policy in the Hawkeye company. The stock of goods and the household furniture, and the house at Grand Junction, were destroyed by a fire having a single origin. The plaintiff, after the fire, compromised his loss under the Hawkeye policy with that company.

The defendant now moves to set aside the general verdict, and for judgment in its favor on the special verdict; and, on the other hand, the plaintiff moves for judgment on the verdict of the jury. It is on these motions that the cause is before the court. The action was only for the value of the goods destroyed by the fire.

Phillips & Phillips, for the plaintiff.

Gatch, Wright, & Runnels, and *Austin Adams*, for the company.

DILLON, *Circuit Judge*.—There are two questions here. One is whether the subsequent policy on the *furniture* in the Hawkeye company, supposing it to be a valid and binding insurance, avoids the policy in suit as respects the *stock of goods*, which was separately valued, there having been no notice to the defendant of the Hawkeye policy.

Allison v. Phoenix Insurance Company.

The other is whether the subsequent policy in the Hawkeye company was such "other insurance" as contravenes the provision in the defendant's policy in that regard, the Hawkeye company having been informed by the plaintiff's application that there was no other insurance on the furniture, but after the loss, having compromised with the plaintiff in respect to its policy, not having had before the fire any knowledge of the policy issued by the defendant or ratifying its own policy with knowledge of the prior policy. The Hawkeye company insisted that its policy was not binding on it because of the misrepresentation as to prior insurance, but the policy covered other risks and the controversy was closed by the payment to the plaintiff of a sum less than the sum insured.

Under these circumstances it is clear that the second policy, as respects the furniture, at all events, could not have been enforced against the Hawkeye company, and, if not, can it be set up by the defendant as constituting other or additional insurance in violation of the condition in that respect, contained in the policy now in suit?

The general, but not uniform, opinion of the courts is, that to avoid the first policy the second policy must be valid, that it must constitute an effectual insurance; and we are inclined to so hold, if this can be done consistently with *Carpenter v. Providence Ins. Co.* 16 Pet. 495. The case last cited has been subjected to much criticism (see *Clark v. New Engld., &c. Ins. Co.* 6 Cush. 342, 350; *Hubbard v. Hartford Fire Ins. Co.* 33 Iowa, 325; May on Insurance, section 365, and the authorities there collected), and, it may be conceded that, though not unsupported, it does not, at least in its reasoning, accord with the prevailing view. But if the case at bar falls within its principle, it is our duty implicitly to apply that principle to it. That case holds that the company which issued the second policy (the Providence company) was entitled to notice of the prior insurance in the

Allison v. Phoenix Insurance Company.

American company, though the policy in that company had been "procured by misrepresentation of material facts"—and the reason given (which has been criticised and its soundness denied) is, that such a policy is not "to be treated, in the sense of the law, as utterly void *ab initio*, but merely voidable, and as one that may be avoided by the underwriters upon the proof of the facts, but until so avoided, to be treated for all practical purposes as a subsisting policy."

The *decision* would make it the duty of the plaintiff to have disclosed the prior insurance in the defendant company to the Hawkeye company, and if he did not, but stated that there was no such prior insurance, the policy in the Hawkeye company, if not ratified, would be void. And it does not establish that the policy in the Hawkeye company is to be considered as in all respects a valid policy unless avoided by that company before the loss.

We are therefore of the opinion that the policy in the Hawkeye company, so far at all events, as respects the furniture, was invalid, that it did not in fact and in law constitute any insurance, and therefore the defence based upon the ground that other insurance was procured contrary to the provisions of the policy in suit, fails. This view is, in our opinion, consistent with the real point in judgment in the case of *Carpenter*, though it may not consist with all the reasoning of the learned justice who delivered the opinion of the court.

This makes it unnecessary to decide whether if the Hawkeye policy had been valid as respects the *furniture*, this would have avoided the defendant's policy as respects the *stock of goods*. On this point the cases cannot be reconciled. That it would not thus avoid the policy as to the goods, see *Lockner v. Home Ins. Co.* 16 Mo. 247; S. C. affirmed 19 Mo. 628; *Phoenix Ins. Co. v. Lawrence*, 4 Metcalfe (Ky.), 9; *Clark v. New Eng. etc. Ins. Co.* 6 Cush. 342, explained, May on

Allison v. Phoenix Insurance Company.

Insurance, sec. 278, note on p. 303; *French v. Chenango Ins. Co.* 7 Hill, N. Y. 123 (compare *Wilson v. Ins. Co.* 2 Selden 53); *Sloat v. Royal Ins. Co.* 47 Penn. St. 12; *Davis v. Boardman*, 12 Mass. 79; *Howard Ins. Co. v. Scribner*, 5 Hill, N. Y. 298.

But on the other hand, that it would avoid the policy entirely, see *Smith v. Empire Ins. Co.* 25 Barb. 497, 504; *Kimball v. Howard Ins. Co.* 8 Gray, 33, 30, compare with *Clark v. New Eng. Ins. Co.* *supra*; *Associated Fireman's Ins. Co. v. Assum*, 5 Md. 165; *Barnes v. Union, etc. Ins. Co.* 51 Maine, 110. In this last case, where there was the usual provision against alienation, or material change of title, and an insurance was effected by the plaintiff on an undivided half of a dwelling house, and afterwards on the petition of his co-tenant, a partition was decreed, this was held to be equivalent to an alienation and purchase, and avoided the policy as to the building, and it was further held that the policy being void as to the building, the plaintiff could not recover for the loss of furniture therein insured in the same policy, and separately valued, the ground of decision being the supposed entirety of the contract, as that if it became void in part it was void *in toto*. I doubt the soundness of this decision, as to the furniture, but as it is not essential, the court gives no opinion as to the point whether a second valid insurance of furniture, there being no fraud, would avoid the first policy, as to the other and distinct property, separately valued.

JUDGMENT FOR THE PLAINTIFF.

Alexander v. Central Railroad.

**CHARLES ALEXANDER, et al. v. CENTRAL RAILROAD OF IOWA,
et al.**

1. A provision in a railway mortgage, authorizing the trustee, on default of the company to pay interest, to take possession of the road, operate it and receive its income, and upon notice, to sell it, is a cumulative remedy, and does not affect the right to foreclosure by bill in equity.
2. The special provision of the deed of trust in question, held not to require a majority of the bondholders to unite in a suit to foreclose for interest, or request the trustee to bring such suit.
3. If a trustee improperly refuses to bring such suit, an individual bondholder may bring it for himself and others, and make the trustee a party defendant.
4. On a dismissal, by the plaintiff, of the bill as to the trustee, the court has a discretion to allow the trustee to file a bill for the benefit of all the bondholders.

(Before DILLON and LOVE, JJ.)

Railway Mortgage.—Foreclosure.—Parties.

THIS is a bill in equity to foreclose a mortgage made by the defendant on its railroad and property. The bill is filed by the plaintiffs as bondholders, who allege that they bring it for themselves and all other bondholders who are similarly situated. It charges default in the company to pay interest. It alleges that the plaintiffs have made a demand on the trustee in the mortgage, viz, the Farmers' Loan and Trust Company, of New York, to bring the suit, and its refusal, and the said company is therefore made a defendant. There is no averment in the bill that a majority of the bondholders unite in bringing it, or united in the request to the trustee to bring it. The trustee appears and files an answer, setting up that a majority of the bondholders have never demanded action on the part of the trustee, and that it is willing to submit to the direction of the court as to its duty in the premises, and to become plaintiff if the court so orders. The railroad company demurred to the bill, on the ground that under the provisions of the deed of trust

Alexander v. Central Railroad.

there could be no foreclosure by bondholders, or by the trustee, unless a *majority* of the bondholders so desired, and there was no such averment.

The following are the provisions in the deed of trust relied on in support of the demurrer: "And the said party of the first part [the railroad company] doth hereby covenant, promise and agree, for itself, its successors or assigns, to and with the said trustee, its successor or successors, that the said company will well and truly pay each and every of said bonds issued by them, and secured by this mortgage, together with the semi-annual interest to become due thereon, at the rate of seven per cent per annum, at the times, in the manner, and at the places specified therein, in United States gold coin. And that in case said company shall, for the space of six months, make default in the payment of said semi-annual interest to become due upon any, either, or the whole of said mortgage bonds, then, after the expiration of twelve months from the time it became due, and without demand or notice, at the *election or option of a majority of the holders of said bonds, the whole principal sum mentioned in each* and all of the said mortgage bonds then outstanding shall *forthwith become due and payable*, and the lien or incumbrance hereby created for the security and payment thereof may at once be enforced.

"And it is agreed, in case of the default of the payment of the semi-annual interest, as above provided, that said trustee, or its successors, is hereby expressly authorized and empowered, upon the request in writing of a majority of the owners or holders of said bonds, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by their agents or attorneys, have, hold, use, and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions and improve-

Alexander v. Central Railroad.

ments thereto, as fully as the parties of the first part might have done before such entry; and to collect and receive all tolls, freight, incomes, rents, issues, and profits of the same and of every part thereof, and the said trustee, and its successors, shall and may, and hereby is expressly authorized and empowered to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises, and privileges herein conveyed. Said sale shall be either in the city of Marshalltown, Iowa, or in the city of New York."

Platt Smith, and J. F. Duncombe, for the plaintiffs.

Boardman & Brown, for the railroad company.

Grant & Smith, for the trustee.

DILLON, *Circuit Judge*.—1. The authority in the deed of trust to the trustee, on default of the payment of interest, and upon the written request of a majority of the bondholders to take possession of the road, to operate it and receive its income, and on three months notice to sell the same, and divide the proceeds of the sale *pro rata* among the bondholders, is a cumulative remedy for the benefit of mortgage creditors, and does not exclude their right to resort to the judicial tribunals for a foreclosure. Especially is this so, as the laws of the state of Iowa forbid sales under powers of this character by proceedings *out of court*.

2. Provisions in an instrument of this character limiting the right of a mortgage creditor to resort to a court of chancery to foreclose his security, are not to be extended beyond the fair meaning of the language used; and it is our opinion that there is no restriction in the deed of trust before us, upon the right of the coupon-holder to foreclose *for interest* upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to

Bronson v. Kukuk.

bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the *whole principal sum* become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon-holder to foreclose for *interest*, in the manner sought in the present bill, and it was not necessary that a *majority* of the coupon-holders should unite in bringing the bill, or in a request to the trustee to bring it.

3. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon-holders, making the trustee a defendant.

4. If the plaintiffs elect to dismiss the bill as to the trustee, we will allow the trustee to become a party plaintiff, and to file a bill for the benefit of all the bondholders; but it would be anomalous to have the trustee on the record both as defendant and plaintiff in the same proceeding. The demurrer of the railroad company to the bill is overruled.

ORDERED ACCORDINGLY.

NOTE.—See *Galveston Railroad Co. v. Cowdrey*, 11 Wall. 459; *Gillman v. Illinois, etc. Telegraph Co.* U. S. Sup. Court, Oct. 1875.

BRONSON v. KUKUK.

1. Until a patent for land emanates, the legal title thereto remains in the United States, and it will protect any equity which the United States may have in the land from a sale for taxes by the state.
2. In 1853, the plaintiff as the assignee of a land warrant, located it upon a tract of land; in 1862, and before any patent had issued, the proper department cancelled the warrant and suspended the location because the warrant had been procured to be issued upon false and forged papers; the plaintiff in the latter part of 1862 substituted an-

Bronson v. Kukuk.

other warrant, and in 1868 received a patent: *Held*, that the land was not taxable for 1861 and that a tax sale and deed for the taxes of that year were void.

3. The assignee of a land warrant, fraudulently procured from the government, has no higher legal rights than the warrantee; and the government, although the warrant is regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value and without notice.

(Before DILLON, Circuit Judge.)

Land Warrants.—Rights of Assignees.—Taxability of Lands Located by Fraudulent Warrant Cancelled Before Patent Issued.

EJECTMENT for 160 acres of land. Trial to court. The plaintiff claims title under a patent from the United States to himself, dated June 1, 1868. The defendant is in possession under tax deeds, which are regular and vest the title in the defendant if the land was subject to taxation under the laws of the state of Iowa, for the year 1861. The defendant had no notice of the defect below mentioned in the plaintiff's entry of the land.

On the trial, the plaintiff offered in evidence a patent from the United States to himself, dated June 1, 1868, reciting that it is issued pursuant to the bounty land act of March 3, 1855, upon a deposit of land warrant No. 98,864, "the warrant No. 25,269, act of 1850, with which the first location was made having been withdrawn and the said warrant, No. 98,864, *substituted in lieu thereof*." The plaintiff then rested.

The defendant offered in evidence: 1. Local land office certificate, dated December 21, 1853, that land warrant No. 25,269 in the name of *Jerenin Lasmate* had that day been located on the land in question. 2. Tax deed, showing that the land was duly sold in 1862, for the taxes of 1861, and other deeds showing that the defendant held the title,

Bronson v. Kukuk.

if any, which those tax deeds conveyed. The defendant thereupon rested.

The plaintiff then offered documentary evidence, showing that on the 9th day of May, 1862, the commissioner of pensions indorsed upon said land warrant, No. 25,269, the following: "Satisfactory evidence having been furnished me that the papers are *false and forged* on which this warrant was issued, it has, therefore, been this day cancelled and declared void as against the United States," and immediately notified the commissioner of the general land office thereof. This last named officer, June 18, 1862, notified the register of the local land office, "that warrant No. 25,269, located December 21, 1853, by Seymour G. Bronson, was cancelled May 9, 1862, because issued on *false and forged papers*; that the location is suspended in consequence of such cancellation, and the locator has ninety days to substitute another warrant, or to enter the tract with cash."

The time was afterward extended, and the plaintiff withdrew in such extended time, to-wit, December 26, 1862, substituted (as recited in his patent of June 1, 1863, *supra*) said land warrant No. 98,864 in lieu of cancelled warrant No. 25,269. The commissioner of the general land office approved of this substitution January 9, 1863, and notified the local land office "that the patent would issue as early as practicable, in the name of Seymour G. Bronson." It was accordingly issued June 1, 1863, and is the only patent for the land in question which was ever issued.

Against the defendant's objection the plaintiff offered the records of the pension office, concerning warrant No. 25,569, which was declared void, and said warrant No. 98,864, and which tended to show that warrant No. 25,269 was issued upon a false and fraudulent application in favor of *Jeremín Lasmate*, when the real soldier was *Jeremín Lasmatre*, to whom, for the same service, a warrant had already

Bronson v. Kukuk.

been issued at the time warrant No. 25,269 was issued. The land is worth \$3,000.

Brown & Dudley, for the plaintiff.

Gatch, Wright, & Runnels, for the defendant.

DILLON, *Circuit Judge*.—The plaintiff located a land warrant on the land in controversy, in 1853, but when in 1862 the warrant reached the pension office, in due course, it was pronounced to have been issued on false and forged papers, and it was in consequence cancelled on the 9th day of May of that year, and the plaintiff given time to *substitute* another warrant, which he did in the latter part of 1862, and received a patent for the land dated June 1, 1863. Meanwhile, the state of Iowa assessed this land for taxation for the year 1861, and sold it in 1862 for the delinquent taxes of the preceding year. If the land was subject to taxation for 1861, the title is in the defendant; otherwise, it is in the plaintiff. Until the patent issued the legal title remained in the United States, yet if “the *right* to a patent is complete, and the equitable title is fully vested in a party without anything more to be paid, or any act to be done going to the foundation of his right,” the land may be taxed, though no patent therefor has yet emanated. (*Railway Co. v. Prescott*, 16 Wall. 603, 608.) .

Assuming that the first warrant was procured from the government upon false and fraudulent papers, the location of such a warrant, if made by the warrantee, would not give any equity to the land as against the government. This is clear. And since land warrants are not commercial or negotiable instruments, it is equally clear upon principle and authority (*Mechanics' Bank v. New York, &c. Railroad Co.* 18 New York, 599, 623; *Wilcox v. Howell*, 44 New York, 398), in the absence of a controlling statute, that the assignee of a warrant has, as against the government, no

Bronson v. Kukuk.

higher equities than the warrantee. Not only is there no statute placing the assignee upon better ground than the warrantee, but the act of congress making land warrants assignable only does so to the extent of "vesting the assignee with all the rights of the original owner of the warrant." (Act of March 22, 1852; 10 Stats. at Large, 3.) The first warrant was decided by the proper officers of the government to have been fraudulently obtained, and the documentary evidence shows that this decision was justified by the facts, and it was acquiesced in by the plaintiff.

If these views are correct the result is that the location of the first warrant did not give a complete equity to the land, and if nothing more had been done the government would have been equitably, as it was legally, the owner of the land, and hence the land was not subject, while this condition of things remained, to taxation. This condition did remain until December 26, 1862, when a valid warrant was furnished by the plaintiff and *substituted* for the other, and it was upon this warrant that the patent was issued.

These views are inconsistent with the doctrine contended for by the defendant, and which has the sanction of the opinion of Mr. Attorney General CUSHING, that if a land warrant has been fraudulently procured from the government and has passed into the hands of an assignee for value and without notice of the fraud, the government is estopped to question its validity. (7 Opinions Attorney General, 657.) Mr. WIRT, as attorney general, had given a contrary opinion, distinguishing, as Mr. CUSHING failed to do, between commercial and negotiable instruments which are governed by a peculiar law, and those which, like land warrants, are not of this character.

Assuming that the government is open to estoppel the same as individuals, the doctrine for which the defendant contends is one which cannot be maintained on legal principles. It applies only to commercial paper. If the maker

Bronson v. Kukuk.

of an instrument, although not of a commercial character, makes representations *aliunde* the instrument on which those to whom the representations are made act, the maker is estopped to deny the truth thereof, but the *mere issue* of such an instrument cannot alone operate to estop the maker from showing into whosoever hands it may come, that its issue was procured by fraud. This subject is so fully examined, and so satisfactorily discussed in the New York cases above cited, that it is not necessary to do more than to refer to them.

Another position taken by the defendant's counsel is that as the patent recites and the evidence shows that the second warrant was *substituted* for the first, this *substitution* has the effect to make the plaintiff's title relate back to the entry of 1853 under the first warrant. There is no statute giving the plaintiff the right to make such a substitution, or declaring the effect of it. Natural justice, indeed, would dictate that he should have an opportunity preferably to others to pay for the land, and this was properly given to him, *ex gratia*, not of legal right, but as against the government, he cannot be regarded as having purchased and paid for the land, until he located a valid warrant upon it, and until payment for the land had been made, it was not taxable.

It is insisted, however, for the defendant, that although it be true that as against the government the sale of the land for taxes was not valid, yet the plaintiff is *estopped*, as against the defendant, from asserting such invalidity. But why? The plaintiff has had no transaction with the tax title purchaser, or with the defendant claiming under the tax title purchaser. He has made no representations to either of them, and they have no covenant of his, nor is there any grant or warranty by him so that his title acquired by the location of the second warrant and the patent will enure to them. A purchaser at tax sale buys upon his own suggestion and at his own risk as to the title he obtains, and a

Upton v. Englehart.

subsequently acquired title does not enure to his benefit. There must be a judgment for the plaintiff.

JUDGMENT FOR PLAINTIFF.

C. W. UPTON, Assignee, etc. v. ANDREW ENGLEHART.

1. The *three-fold relation of stockholders* in an incorporated company to the corporation, to other stockholders, and to the creditors of the corporation considered.
2. The *effect of fraud* practiced by an agent of a company to induce a person to subscribe for stock therein, considered, and the doctrine asserted that as between the company and the person thus induced by fraudulent and deceptive statements to take the stock therein, the same principles apply as would apply to like contracts between individuals.
3. In such a case the company cannot retain any benefit which it has obtained through the fraud of its agent, and it is ordinarily no answer to the claim of a person to be relieved against a contract procured from him by fraud, to show that by more inquiry he could have learned the truth.
4. Applying this rule it was held that there might be fraudulent representations concerning the laws of another state and the provisions of the charter of the company granted therein.
5. A *contract to purchase* shares induced by fraudulent representations or concealment is not void, but only voidable—that is, it is valid until disaffirmed, and not void until affirmed. And where the rights of creditors are concerned the contract must be repudiated promptly on discovering the fraud, or it will be held binding as to them.
6. How repudiated, and when, see cases cited in the opinion, and see note, and *Upton v. Triplecock*, U. S. Sup. Court, Oct. term, 1875.

(Before DILLON and LOVE, JJ.)

Contract to Purchase Stock in Incorporated Companies.—Defences.—Fraud in Procuring Subscription.

ON demurrer to second special defence pleaded in the answer. The action is by the plaintiff as assignee in bankruptcy of the Great Western insurance company of Chicago.

Upton v. Englehart.

go, to recover of the defendant the amount due on a contract by which the defendant in September, 1870, became, as it is alleged, the purchaser of five shares of stock in that company. The petition sets out that the contract to purchase stock was verbal and that the company delivered and the defendant accepted certificates for five shares thereof of \$100 each; that the company sustained heavy losses by the Chicago fire; that on the 6th day of February, 1872, it was adjudicated a bankrupt by the United States district court, for the northern district of Illinois, which subsequently, July 5th, 1872, ordered that the assignee collect the entire amount unpaid on the capital stock of the company.

The plaintiff has accordingly brought in this court numerous actions against persons alleged to be stockholders in the company, residing in this state, and they make substantially the same defences.

The second special defence to which the demurrer relates sufficiently appears in the opinion.

Nourse, Kauffman & Holmes, for the plaintiff.

E. W. Eastman, H. B. Fouke and J. L. Frazier, for the defendant.

DILLON, *Circuit Judge*.—Whoever becomes a stockholder in an incorporated company sustains a three-fold relation: *First*, to the artificial person called the corporation. *Second*, to the other stockholders in the same company, or in other words, his associates or partners, who by force of statute are clothed with corporate capacity. And *third*, to the creditors of the corporation. It is essential to bear these several relations in mind in determining the questions here presented. The capital is supplied by the shareholders, who alone participate in the gains or pecuniary advantages which may accrue from the carrying on of the corporate enterprise. The shareholders are the real parties in in-

Upton v. Englehart.

terest; the incorporating statute empowering them to contract and be contracted with through the medium of a corporate representative.

In the case before us, the plaintiff sues as the assignee in bankruptcy of the corporation, and therefore can enforce not only the rights which the corporation could have enforced if insolvency or bankruptcy had not supervened, but the rights of general creditors as well.

It appears by the pleadings, that the company was created by a charter of the state of Illinois, and that prior to the alleged contract with the defendant, it re-organized under the general incorporation act of that state (Gross's Stats. Ill. ch. 53, p. 352.) This act authorizes persons to associate themselves as an insurance company and adopt a charter and file the same in the office of the auditor of public accounts and publish notice thereof. This officer is to cause an examination to be made as to whether the required amount of capital in money, stock and bonds has been raised; and each company is required to make an annual statement of assets and liabilities, which is to be included in the auditor's regular report.

The section of the answer to which the demurrer under consideration relates, avers that the company sent an agent to Iowa to procure its stock to be taken, and sets forth the facts intended to show that this agent made false and fraudulent representations of a material character to induce the defendant to agree to become a stockholder therein. Among other representations one was that \$20 per share would be full payment for the stock and that the remaining eighty per cent was "non-assessable." And such was the defendants' written agreement with the company set out in the answer, dated September 14, 1870. But the certificate of stock which the defendant received, though marked "non-assessable," does not otherwise state that the stock is fully paid for or that no more than the twenty per cent therein mentioned is to be called in.

Upton v. Englehart.

The answer alleges that the purchase of the stock was induced by the fraudulent acts and representations of the agent of the company and that the "defendant is in no way bound" thereby, and that he long ago repudiated said purchase by refusing to pay any more "of the installments.

And here the plea may be considered in a double aspect : *First*, does it set forth a sufficient answer if the action were one by the company before insolvency to enforce payment for the stock. *Second*, does it set forth a sufficient answer to such an action when brought in the interest of creditors of the company after it has failed.

Assuming that the statements in the plea are true, it appears that the defendant was induced to agree to become a shareholder by false and deceptive statements of the agent, and even of the company itself as shown by the character of the certificate it issued. The effect of fraud practised to induce a contract to subscribe to stock or purchase shares is, as respects the company and the person deceived, the same as in other contracts, with the modifications arising from the peculiar nature of the transaction as to repudiating or rescinding the contract, which will be adverted to further along. Speaking of contracts to become a shareholder, induced by the fraud of the company or its agents, Lord ROMILLY says: "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of truth is concerned, are to be treated like contracts between any two individuals. If one man makes false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual." *Directors, etc. of Central Railway of Venezuela v. Kisch*, Law Rep. 2 H. L. 99, 125, 1867. *Smith's Case*, L. Rep. 2 Ch. App. 604, 609.

The effect of agreements to purchase shares in companies has, of late years, been oftentimes before the courts of

Upton v. Englehart.

Great Britain and the general principles of law are well settled.

The rule sanctioned by the house of lords is that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations or by fraudulent concealment of the directors, and the directors seek to enforce the contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent." (*Oakes v. Turquand*, Law Rep. 2 H. L. 325, 344, 1867, in which Lord Chancellor CHELMSFORD approves, *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L. Scottish, 145, decided on general principles.) This principle has been so often decided and is so well established that it is not necessary to cite the many cases upon the subject.

The fraudulent misrepresentation or concealment must of course relate to material facts, but if it does, and has induced a person using reasonable caution and judgment, to enter into a contract to purchase shares, it is ordinarily no answer to his claim to be relieved of the contract that by more vigilance he might have discovered the deception. This point is expressly adjudged by the house of lords in the *Directors, etc. of the Central Railway Co. of Venezuela v. Kisch*, Law Rep. 2 H. L. 99, 1867.

In the case just cited, Kisch sought to be relieved of his contract to purchase shares in the railway company, and it was objected that he had "no ground of complaint because he had an opportunity of ascertaining the truth of the representations contained in the prospectus, of which he did not choose to avail himself; that in his letter of application to purchase shares he agreed to be bound by all the conditions and stipulations contained in the memorandum and

Upton v. Englehart.

articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus." To this position the Lord Chancellor made answer: "But it appears to me that when it is once established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him he might have known the truth by proper inquiry." He has a right to retort upon his objector, "you, at least, have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." The same principle was announced in the same case by Lord CRANWORTH. L. R. 2 H. L. 121. See also *Mead v. Bunn*, 32 N. Y. 275, 280; *McClellan v. Scott*, 24 Wis. 81, 87. There seems to be some difference in opinion, however, on the point whether as respects creditors the purchaser of shares is not bound to take notice of the provisions of the articles of association. *Oakes v. Turquand, supra*; *Reese, etc. Mining Co. v. Smith*, L. R. 4 H. L. 64, 72; *Downes v. Ship*, L. R. 3 H. L. 342.

Considering that the transaction between the defendant and the company's agent set up in the plea took place in a state different from that in which the company was organized, and that its charter was on file in the auditor's office in Illinois, it is our opinion that it would be possible for the agent of the company to make fraudulent representations concerning the laws of Illinois and the charter of the company, and that if he did represent that, by those laws and the charter, eighty per cent of the stock was "non-assessable," and the defendant relied upon this, he is entitled, in the absence of laches and acquiescence, as against the company, to resist payment of this eighty per cent. In this connection, it may be mentioned, that it is the duty of a per-

Upton v. Englehart.

son who has been fraudulently drawn into the purchase of shares to take prompt measures on discovering the fraud, to repudiate or rescind the contract. And the reason for this is two-fold: 1. Because his remaining in the company may mislead others into becoming members of it upon the credit of his name, when otherwise they would not do so. 2. Because it may likewise induce others to deal with it and give credit to it for the same reason. *Directors, etc. v. Kisch, supra*; *Bwlch-y-Plwm & Co. L. R. 2 Exch. 326*; *Ashley's Case, L. R. 9 Eq. 262*; *Scholey v. Central Railway Co. of Venezuela* (bill by shareholders against company), *L. R. 9 Eq. 267*, note, decided by Lord Chancellor CAIRNS. In the case last cited the Lord Chancellor said: "He certainly thought that the court would be most careful to see, in a company going on and trading, in which the rights of shareholders and others varied from day to day, that a person coming to complain of misrepresentations of this kind, and coming to avoid a voidable contract came within the shortest limit of time which was fairly possible in such a case." It results from the foregoing considerations that if this were an action by the company for calls, or a suit by the defendant against the company to rescind the contract for the purchase of stock, and the facts were as set out in the answer, the law would be with the present defendant, provided it appeared that he had been guilty of no laches in discovering the fraud, and thereupon promptly repudiated the contract. How the contract may be repudiated or disaffirmed, see *Bwlch-y-Plwm & Co. (sufficiency of plea), L. R. 2 Exch. 324*; *Ashley's Case, L. R. 9 Eq. 263*; *McNeill's Case, L. R. 10 Eq. 503*; observations of Lord Chancellor HATHERLEY in *Smith's Case, L. R. 4 H. L. 64*, on p. 73; Lord WESTBURY in *S. C. p. 77, 78*; Lord CAIRNS, *Ib. p. 70, S. C. below, L. R. 2 Ch. App. 604*; *Oakes v. Turquand, supra*, and cases cited *infra*.

It remains to consider how far the foregoing principles

Upton v. Englehart.

are modified when the company has failed or become bankrupt and the rights of creditors, in addition to those of shareholders, are involved. As respects creditors "the stockholders are special partners, incorporated to carry on the business of the company, and the stock subscribed and secured by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them," and the stockholders are debtors to the company for their unpaid stock. *Ogilvie v. Knox Ins. Co.* 22 How. 380, 387.

Assuming this to be, as it unquestionably is, a correct view of the relation of stockholders to the company and to the public, the argument is made on behalf of the defendant, that if he was induced by the fraud of the company to agree to purchase its stock, he does not thereby become a stockholder, because an agreement obtained by fraud is void, and the person so injured has a right to repudiate it and treat it as utterly invalid from the beginning, as regards the company, and that the company's creditors have in this respect no higher right than the company itself. In other words, if the company has no right to collect the subscription or purchase money, for the shares, its creditors, who are not creditors of the subscriber to the stock or the shareholder, must claim through it and can stand on no better ground, and the right of the assignee in bankruptcy as the representative of creditors is simply the right to collect the assets of the company, and if the person claimed to be a stockholder is not by reason of fraud entitled to be held as such by the company, this answers any possible right of the assignee to a recovery. But the proposition is not a sound one, that the right of a person who has been drawn into the purchase of stock by the fraud of a company or its agents to relief is as great against creditors as it would be against the company. If the contest is with the company, it is essentially one with the alleged shareholder's own partners or

Upton v. Englehart.

associates, and if their corporate representative or its agents have practised a fraud upon him, he is entitled to relief against it. But if a person has accepted a certificate of stock and becomes, to all external appearance, a stockholder, persons may have become creditors of the company on the faith of his membership and in law are presumed to do so, and as they cannot know the manner in which he was induced to become a stockholder, there is ground to maintain that as to them the manner is immaterial.

Upon consideration of the adjudged cases, and upon principle, our judgment is that a contract to purchase shares induced by fraudulent representations or concealment is not void, but only voidable, which means, as the house of lords has decided, that it is valid until disaffirmed, and not that it is void until affirmed. *Oakes v. Turquand, supra*; *Reese, etc. Mining Co. v. Smith*, L. R. 4 H. L. 64; S. C. case below, L. R. 2 Ch. App. 604.

This doctrine, it will be seen, gives to the purchaser of shares, though his purchase was induced by fraud, the right to hold on to them if it should be profitable to do so; and as the rights of creditors may become involved, who can ordinarily know nothing of the fraud practised upon the shareholder, the law as a condition of relief to the latter requires that he shall be guilty of no *laches* in discovering the fraud and in repudiating the purchase.

Speaking of this subject, Lord ROMILLY, in *Ashley's case*, above cited, after referring to the course of decision, says; "The leading principle in all these cases is this: A man must not play fast and loose; he must not say 'I will abide by the company if successful, and I will leave the company if it fails;' and therefore when a misrepresentation is made of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company or whether he will remain a member." L. R. 9 Eq. 262, 268; *McNeill's Case*, L. R. 10 Eq. 508, 1870.

Upton v. Englehart.

Under the English companies' act of 1862, though there has been such fraud as will enable a subscriber to defend against calls and though he has repudiated the contract within a reasonable time, yet there seems to be a tendency to hold that he is liable to creditors if he has not taken active steps to have his name removed from the *register of shareholders* before proceedings are taken to wind up the company for insolvency. *Oakes v. Turquand, supra*; explained and principles applied, *Reese, etc. Mining Co. v. Smith*, L. R. 4 H. L. 64, 1869; *Ætna Ins. Co. etc.* 6 Ir. Rep. Eq. 298; and see *McNeill's Case*, L. R. 10 Eq. 503; *Henderson v. The Royal British Bank*, 7 El. & B. 356; compare *McNeill's Case*, L. R. 10 Eq. 503.

These decisions are doubtless in some degree influenced by the special provisions of the *companies' act*, particularly that of 1862, but the general course of reasoning therein is applicable to cases of insolvent or bankrupt corporations in this country. There is no *register of stockholders* in Illinois provided for, and it is possible that the decisions in England requiring active steps by bill in chancery to have one's name removed from the register might not be applicable in their full extent here. Indeed, I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no *laches* in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company subsequently happening will not enable the assignee to insist that the purchase of stock is binding upon him. But it is not necessary as the plea stands to rule the point. *McNeill's Case*, L. R. 10 Eq. 503, and cases *supra*. The plea is defective in that it does not show that the de-

Upton v. Englehart.

fendant made use of reasonable diligence to make himself acquainted with the matters of fact in respect of which the fraud is claimed, nor when or how he repudiated the contract, nor whether he offered to surrender the certificate of stock promptly on discovering the fraud.

For these reasons the demurrer to the second special defense or plea is sustained.

DEMURRER SUSTAINED.

LOVE, J. concurred.

NOTE.—See and compare *Upton v. Tribblecock*, decided by the supreme court, October term, 1875, where this subject, in the general aspects discussed in the foregoing opinion, is considered.

Farrar v. Walker, decided by MILLER, circuit justice, on appeal, September, 1875, relates to this subject, and is reported from short-hand notes, taken at the time (S. C. 2 Cent. Law Jour. No. 42.)

JOHN FARRAR v. WILLIAM R. WALKER, Assignee, etc. and JOSEPH T. REISTER.

1. A contract to take stock in a corporation, induced by fraudulent representations on the part of the directors and officers of the corporation, is not void, but only voidable at the option of the stockholder.
2. Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation to take stock in the corporation two years before its bankruptcy, for which he gave in payment his notes secured by deed of trust on real estate, and during that period made no inquiry as to the true condition of the corporation, but suffered his notes to be held out to the public as assets of the corporation—the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the notes.
3. A certificate of stock is not essential to constitute membership in a joint stock corporation.

(Before MILLER, Circuit Justice.)

Bankruptcy.—Corporations.—Frauds upon Stockholders.—Rights of Creditor.

APPEAL from the United States district court for the eastern district of Missouri.

John Farrar, the complainant and appellant herein, brought his bill in the district court to enjoin the defendants, who are respectively the

Upton v. Englehart.

assignee in bankruptcy of the North Missouri Insurance Company, and the trustee in the deed of trust hereinafter mentioned, from selling certain realty described in the bill, and to have a certain deed of trust executed by the complainant, on said realty, for the purpose of securing his note for \$1000, cancelled and set aside. Said note and deed of trust were executed and delivered on the 30th of December, 1871, by complainant to said insurance company, which was a joint stock corporation, in payment of the price of the shares of the capital stock of that company, each of the par value of \$100, which complainant at that time purchased of said company. The company was, on the 8th of November, 1873, adjudged bankrupt upon a creditor's petition filed on the 2d of October, 1873. The claim for the relief sought by the complainant was based on two grounds, viz:

First. On the ground of false and fraudulent representations concerning the financial condition of the company, alleged to have been made by the directors, officers and agents of the company, at and before the time when said note and deed of trust were given, whereby complainant was induced to take stock in said company, and to give the note and deed of trust aforesaid in exchange therefor, and subsequent false and fraudulent representations made by said directors, etc. whereby complainant *continued* to be deceived as to the true character and financial condition of the company; and

Second. On the ground that complainant received no certificate of stock, and that, consequently, the consideration for the note and deed of trust fell.

To complainant's bill, defendants interposed a demurrer, which the court below sustained, and a decree was entered dismissing the bill. From this decree complainant appealed to this court.

On the part of complainant the following points were made:

1. Fraudulent representations made by the authorized agents of a corporation, and by the company in regard to material matters, constitute a good defense to an action for the subscription to stock made on the faith of such representations.

Waldo v. Chicago R. R. 14 Wis. 375; *Crump v. U. S. Mining Co.* 7 Grattan (Va.) 352; *Wert v. Crawfordsville Co.* 19 Ind. 242; *Grossman v. Penrose Ferry Co.* 26 Penn. State Rep. 69; *Custor v. Titusville Gas Co.* 63 Id. 381; *Cunningham v. Edfield & Ky. R. R. Co.* 2 Head (Tenn.) 28; *Bandford v. Hardy*, 23 Wend. 259.

2. The questions of negligence or estoppel by some act of subscribers, have frequently been decided by the courts, and generally it is some extraneous circumstance showing acquiescence in the fraud, or a long lapse of time where the rights of others have intervened, which governs the cases where the contrary doctrine is laid down. Most of defendant's authorities are of these classes.

Upton v. Englehart.

3. The question of completion of the contract in the bill is stated as follows: "That the company refused to deliver the stock to the complainant, and never did complete the contract on their part." The assignee seeks to hold complainant to a contract never executed by the company. If the company was still doing business, complainant might compel the issue of the stock, but the assignee can not issue it. Complainant received no value or consideration for his money, and in equity ought not to be held to pay. *Angell & Ames on Corporations*, sec. 564.

4. The company could only contract by its president and secretary. 1 *Wagner's Statutes*, p. 764, secs. 21 and 22.

Therefore it could not be held on this contract at law. A bill in equity would have to be filed by complainant to get his stock. There is no mutuality of contract here, and complainant had a right to rescind.

5. There are cases where it has been held that absence of a stock certificate does not affect the stockholder's right to his stock, but the reason given is that the issue can be compelled. Not so in this case.

6. If complainant was guilty of *laches*, and for that reason ought to pay, it should be set up in an answer so that a reply might be had. The bill on its face does not show *laches*. Therefore the demurrer should have been overruled.

7. The assignee takes the bankrupt's estate with its burdens, and can enforce no contract that the company could not enforce, unless there are circumstances which estop complainant from setting up the fraud, such as *laches*, lapse of time, acquiescence or participation in the organization or transactions of the company, after knowing the fraud. No such state of facts exists in this case so far as the record shows. 3 *Vesey*, 288; 12 *Vesey*, 349.

For the defendants it was urged:

1. The contract between the complainant and the company to take stock, was not void by reason of the fraud alleged, but voidable only at the option of the party defrauded. *Oakes v. Turquand*, Law Rep, 2 H. L. 325, 344, in cases there decided; *Reese, etc. v. Smith*, L. R. 4 H. L. 64 S. C. 2 Chan. App. 604; *Upton v. Englehart*, *ante*, decided by DILLON and LOVE, JJ; *Clark v. Dickson*, E. B. & E. 148, and cases there cited.

2. The bill not showing any disaffirmance prior to the company's bankruptcy, of the contract to take stock, and not showing that complainant used reasonable diligence in discovering the alleged fraud, or made any inquiry whatever as to the truth of the alleged representations, or that he was not otherwise guilty of *laches*, said contract cannot be avoided as against the company's creditors. *Upton v. Englehart*, *supra*, and cases there cited; *Upton v. Hansbraugh*, 10 Nat. Bk. Reg. 398; *Clark v. Dickson*, *supra*.

Upton v. Englehart.

3. The alleged misrepresentations, although they might constitute a good defense as against the company itself, constitute no defense as against the creditors of the company, represented by its assignee in bankruptcy. *Ogilvie v. Knox*, 22 How. 380; *Upton v. Hansbraugh*, *supra*; *Oakes v. Turqvand*, *supra*; *Clark v. Dickson*, *supra*.

4. It is not essential, in order to constitute a person a stockholder in a joint stock corporation, that a certificate should be issued to him. *Agricultural Bank v. Burr*, 24 Maine, 256; *Same v. Wilson*, *Ib.* 275; *Ellis v. Essex Merrimac Bridge Co.* 2 Pick. 243; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Hoagland v. Bell*, 36 Barb. 57; *Thorp v. Woodhull*, 1 Sandford, 411; *Commercial Bank v. Kortright*, 22 Wend. 348; Angell & Ames on Corporations, 9 ed. pp. 568, 564.

In the course of the argument, the court expressed the opinion that the want of a certificate of stock was immaterial.

Henderson & Shields, for the complainant.

Wm. R. Walker, for the defendants.

MILLER, *Circuit Justice*.—This is a suit brought by the plaintiff, who was a stockholder in the North Missouri Insurance Company, to get rid of the payment of a note for \$1,000, which he had given in the purchase of stock. Mr. Farrar took stock in the company, and gave this note in payment for that stock, secured by deed of trust on real estate. Two years after the giving of the note, the North Missouri Insurance Company failed, and was put in bankruptcy, and Mr. Walker was appointed assignee of the company, and being about to enforce that obligation for the benefit of the creditors, Mr. Farrar files his bill in the district court, in chancery, seeking to enjoin the sale of the property conveyed by the deed of trust, which was about to be foreclosed. In that way he brings the proceeding into court to declare the note null and void, and he makes in his bill undoubtedly a case of fraudulent conduct on the part of the board of directors, or the officers of the insurance company—the whole of them—in publishing and representing to him very fraudulently and very falsely, that the insurance company was on its feet, in a prosperous condition; had a large amount of valuable assets beyond its liabilities, and that it was a good thing to take its stock; whereas he alleges that was false, and that the company was then insolvent, that these men knew it, and that he was defrauded in becoming a stockholder. We may say at the beginning, and the authorities on this point are clear, that if the corporation was still in existence, and was solvent and doing business, and suit was brought upon that instrument, Mr. Farrar could have pleaded these things in avoidance of that conveyance, and the corporation could not have enforced it against him. But things are changed; the corporation has become bankrupt; it has no

Upton v. Englehart.

interest whatever in this conveyance, because, whether enforced or not, the corporation is practically dead, will not exist as an entity again, and will never receive a dollar of this money. It is now a question between the creditors of that corporation who are represented by Mr. Walker, the assignee, and a stockholder who is indebted to the corporation for its stock, and while my first impressions were pretty strong against the idea that this liability could be enforced under such circumstances, and I was very much inclined to overrule the demurrer, and require the parties to answer and let all the facts be shown on a final hearing, due consideration has changed my mind on the subject, and compels me to the conclusion that the bill must be dismissed, for these reasons: That the contract as it stands (admitting the fraud), is not of that class which is absolutely void, but is a contract, or obligation, which was voidable at the option of Mr. Farrar. He could, notwithstanding the fraud, hold on to the stock and take the chances of its becoming valuable; or he could say, if he chose, "I don't think it is worth the trouble to go into a fight to avoid this obligation." In other words, it was his option to avoid that contract or stand by its legal results, and if this failure had occurred within two, three, or even four months after he took the stock and became a stockholder in the company, I should be inclined to say that he had not had a reasonable time in which to examine into the affairs of the company, and see whether he had been defrauded; and that he had still remaining, an option, even after bankruptcy of the company and the appointment of an assignee, to bring suit to set aside that conveyance, if he could show that it was fraudulent. But the business of these corporations is so managed in this country, that justice requires, at all events, that if one of its stockholders should make his paper or obligation secured by real estate, which goes into the hands of the officers as so much assets of the corporation, and is paraded before the public as an asset, and he stands still for two years and lets that note or obligation of his, secured by real estate, be counted every year, or in every semi-annual statement that is made to the public, as so much cash, which the creditors of that company may look to to cover their losses—then it is too late, the lapse is too long, under the circumstances, to allow the fraud to be pleaded. Mr. Farrar was for two years a stockholder in that corporation; he had a right of access to all its books, and to vote for its directors; it was his duty to interest himself in its management so far as to see that what it said was true; that its directors were honest; that he should use his influence to get honest men in, and yet during these two years he stands idle and does nothing, makes no inquiry, no investigation. It is too late when the creditors pursue the corporation into bankruptcy, and the assignee pursues him for his note, to turn around and say, "I find that I was swindled; I was there two years and might have found it out and not

In re Israel.

let everybody trade on my note deposited there, but I was cheated, and I now rescind this contract." On that ground alone the bill comes too late, and the demurrer to the bill was properly sustained in the district court.

The decree of the district court is affirmed.

AFFIRMED.

[This opinion was delivered orally at St. Louis, September, 1875, and taken by a short hand reporter.]

IN THE MATTER OF M. C. ISRAEL, Bankrupt.

1. In estimating the number and value of creditors who must join in the petition in involuntary bankruptcy, under section 39 of the bankrupt act as amended by section 12 of the act of 1874, creditors who have been fraudulently preferred by the debtor are not to be counted.
2. Number and amount of creditors in bankruptcy proceedings against a member of a firm. *See note.*

(Before DILLON, Circuit Judge.)

*Bankrupt Act.—Number and Value of Petitioning Creditors.—
Creditors Fraudulently Preferred.*

THIS case was presented by a petition of M. C. Israel, asking the review and reversal of an order of the district court of Iowa, at Keokuk, made on the 26th day of February, 1875, adjudicating him a bankrupt upon the petition of certain of his creditors. The petition of the creditors in the bankruptcy court, charges that Israel preferred certain creditors contrary to the bankrupt law, by giving them mortgages and assigning accounts to them. Israel answered simply denying that the petitioning creditors constituted one-fourth in number of his creditors, and that the aggregate of their debts provable under the bankrupt act amounted to one-third of the debts so provable, and with his answer filed a list of his creditors. To this answer the

In re Israel.

petitioning creditors filed a replication with a list of creditors, and alleging that the petitioning creditors constituted one-fourth in number of the creditors holding unsecured debts exceeding \$250, and further alleging that certain creditors in the list annexed to the debtor's answer were fully secured, and had received preferences contrary to the bankrupt act, knowing that a fraud on the act was intended, and insisting that such creditors should be excluded from that computation in making up the required one-third in amount. The replication, however, does not charge actual fraud. To the replication there was filed by Israel a demurrer raising two questions; first, that secured creditors should not be excluded from the computation; and second, that the preferred creditors should not be excluded from the computation. The debtor, Israel, by agreement, as shown in the order of adjudication, also filed a rejoinder to part of the replication, stating that the secured creditors named in the reply were only secured to the amount of \$2,000, and not fully secured. To the rejoinder the petitioning creditors filed a demurrer.

The district court overruled the demurrer of Israel to the replication of the petitioning creditors, and sustained the demurrer of the petitioning creditors to the rejoinder of Israel, and adjudged Israel bankrupt. To reverse this order, Israel brings the case here by petition in review, under section 2 of the bankrupt act.

Howell & Anderson, for the petitioning creditors.

Gillmore & Anderson, and *James Hageman*, for the bankrupt.

DILLON, *Circuit Judge*.—One proposition of law applied to this case, results in affirming the decree, adjudicating the debtor a bankrupt. It was not denied that a sufficient number of the creditors joined in the proceeding. The contest

In re Israel.

was whether those who united in the petition and promoted the proceeding, represented one-third *in value* of the debts over \$250 provable in bankruptcy. By his answer the debtor alleged that they did not. The replication of the petitioning creditors to this answer alleged :

1. That *all* of the creditors named in the answer of the debtor, except the petitioning creditors, were *fully secured*.

2. That *all* of said creditors, other than the petitioning creditors, had accepted and still held *preferences* contrary to the bankrupt act, and in fraud of its provisions. The debtor demurred to the whole replication, and the court below overruled it and the defendant stood upon his demurrer, and did not rejoin to the second ground in the replication. The only rejoinder was to the first ground of the replication, and was to the effect that their debts were not fully secured, but secured only to the extent of \$2,000. It stands admitted, therefore, on the record, that all of the creditors specified in the list furnished by the debtor, except the petitioning creditors, had received, and *still held* fraudulent preferences. These represented more than two-thirds in value of the debts; and the question is, shall they be counted in determining whether the requisite number of creditors, as to value, had joined in the proceedings? On this point I have no doubt whatever. Such a construction as the debtor contends for, would be directly in the face of section 23, as well as hostile to the spirit and purpose of the bankrupt act. A leading object of that enactment is to enable the honest creditor, through the assignee, to defeat unlawful preferences.

Shall a debtor, by fraudulently preferring three-fourths and a fraction in number, or two-thirds and a fraction in value of his creditors, put it in their power to make the fraud effectual by refusing to commence bankruptcy proceedings, or what results in the same thing, requiring them to be counted as creditors on the question whether bankruptcy

In re Israel.

proceedings shall be initiated. If the debtor is not thrown into bankruptcy, their preferences stand, and the law is evaded. If he is thrown into bankruptcy, they lose, or, are liable to lose, their illegal advantage. Such a construction makes the act *felo de se*. It offers a premium to fraud, and would leave nothing of the bankrupt act worth saving.

The honest creditor who refuses to violate the law and take a preference, would alone suffer, while the unscrupulous creditor would reap the harvest of his unlawful security. It would leave the unsecured creditors wholly at the mercy of those that have obtained illegal preferences. This disposes of the case without determining the other questions, whether creditors, who hold *valid* securities, shall be counted in whole or for the excess of debt over the security. Without deciding this I may add, that the course of the argument, based upon section 9 of the amended act, sections 19 and 23, of the original act, and forms 21 and 25, and sections 39 and 43, as amended, rather impressed me with the opinion that a secured creditor is *prima facie*, at least as to the debt secured, not to be counted, but if he comes forward and offers to surrender his security, he is then to be regarded as an unsecured creditor. Possibly, but this is more doubtful, on proper proceedings an inquiry may be had at the instance of a secured creditor, to ascertain the excess of the debt over the security held therefor.

But I give no opinion on these questions, and reserve them until a *case arises* which shall make their determination necessary.

AFFIRMED.

NOTE.—*In re Price, Bankrupt.*

At Chambers, September 23th, 1875.

Case submitted on a bill of review under section 2 of the bankrupt act.

Hall v. Union Pacific Railroad Company.

Bankrupt Act.—Number and Amount of Creditors Required to Join.—Individual and Partnership Creditors.

MILLER, *Circuit Justice*.—The only question necessary to decide in this case, is whether the required number of creditors holding the required amount of debts provable under the bankrupt act have joined in the creditors' petition. In proceedings in bankruptcy against a member of a firm the debts due from the partnership are debts of each member of the firm, and are to be considered in determining the question as to whether a sufficient number of creditors, holding a sufficient amount of debts provable under the bankrupt act, have joined in the creditors' petition for an adjudication of bankruptcy against any member of such firm. The partnership creditors stand in the same relation to a member of such firm as do his individual creditors, so far as the required number of creditors and amount of provable debts are concerned in such proceedings. It does not sufficiently appear from the record in this case, that one-fourth at least in number of the partnership and individual creditors of said Price, the aggregate of whose debts, provable under the bankrupt act, amounts to at least one-third of the debts so provable against him, have joined in the creditors' petition.

Therefore it is ordered that the judgment of the district court of the western district of Missouri, adjudicating Thomas D. Price a bankrupt, is reversed, and the cause remanded to said district court for further hearing, with leave to the parties to amend their pleadings and procure the signature of the required proportion of creditors of the debtor, and that the petitioning creditor pay the costs of the proceedings under his bill of review.

REVERSED.

SAMUEL E. HALL, *et al.* v. UNION PACIFIC RAILROAD CO.

1. The act of March 3d, 1873 (17 Stats. at Large, 509) gives to the proper circuit court jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act.
2. Whether the circuit court for the district of Iowa can acquire jurisdiction over the company under this act, *quære*.
3. Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law, may institute proceedings under the act of March 3d, 1873, *supra*, without the sanction of the attorney general.

Hall v. Union Pacific Railroad Company.

4. Cases in which the attorney general must, and in which private citizens may, apply for the writ, considered.

(Before DILLON and LOVE, JJ.)

Jurisdiction of United States Circuit Court in Mandamus Cases.
— *When Private Person may Institute Proceedings.*

A PETITION or statement under oath, is filed in the court, by Samuel E. Hill and John W. Morse, citizens of the United States, and of the state of Iowa, asking for a writ of mandamus to be directed to the Union Pacific Railroad Company to compel it to operate its trains over the whole of its road as one continuous line, from Council Bluffs westward, and to desist from operating its bridge over the Missouri river between Council Bluffs and Omaha, as an independent and separate line or portion of its road. The nature of the statements made by the prosecutors, and of their interests, and of the particular duty which it is sought hereby to compel the respondent to perform, appear more at large in 2 Dillon C. C. R. 527. The decision then made settled the mode of procedure herein to be in accordance with the practice at common law, and the counsel for the prosecutors or relators now move for an alternative writ of mandamus to be directed to the Union Pacific Railroad Company, commanding it to operate the whole of its line of road to and from Council Bluffs, etc., as above stated. A notice of the application was served upon a general agent of the company at Council Bluffs. No appearance is made by the company, but counsel in its interest have been heard to make suggestions against the granting of the alternative writ.

John N. Rogers, Sapp, Lyman & Hanna, and A. V. Larimer, for the prosecutors.

James M. Woolworth, and A. J. Poppleton, contra.

Hall v. Union Pacific Railroad Company.

DILLON, *Circuit Judge*.—On March 8d, 1873, it was enacted by congress that the “proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law.” (17 Stats. at Large, 509.) This act is the basis of the present proceeding, and the proper practice under it has been already determined. (*United States ex rel. Hall, et al. v. Union Pacific Railroad Co.* 2 Dillon, C. C. R. 527.) The question before us at this time is whether an alternative writ shall be ordered.

The relator’s counsel have been heard in support of the motion for the writ; and in a matter of so much importance we willingly granted the application of counsel to be heard in opposition, although they do not enter an appearance for the respondent. Two leading objections have been urged against awarding the writ. The one relates to the *jurisdiction* of the court over the company; the other to the *form* of the proceeding.

Whether the circuit court for the district of Iowa is the “proper circuit court” to hear and determine the case made by the relators, need not, and perhaps can not, now be determined. If the writ be awarded, but can not be served on the respondent so as to give the court jurisdiction over it, then, unless there is a voluntary appearance, the proceeding will necessarily fail. The petition or information sets out that the eastern terminus of the respondent’s road is in this state; and we are not prepared now to say as a matter of law arising from statutes of which we take judicial notice, that it appears that in no event can this court obtain jurisdiction under the act of 1873, over the company, to compel it to operate its road as required by law. If it was admitted or appeared that no part of the road was in the district, and that the company had no principal place of business therein, we might have the data, perhaps,

Hall v. Union Pacific Railroad Company.

to decide whether in any event this court could acquire jurisdiction over it. Under the circumstances, we reserve the question as to jurisdiction until we see whether the company appears, or until the character of the service of the writ upon it, is known to us.

Whether the facts stated by the relators show a failure by the company to operate the road according to law, is a question which may arise on demurrer to the alternative writ, or on the return thereto, in case the court shall acquire jurisdiction over the respondent, but which we do not consider at this stage of the proceeding.

This brings us to the objections which relate to the *form* of the proceeding. It is contended that the affidavits should be filed, or the writ moved for, by the public law officer of the United States, — either the attorney general or the district attorney. In other words, as the duty here sought to be enforced is one which the company owes to the public at large, and one in which the relators have no special interest distinct from other citizens, it is maintained that the law officers of the United States have the sole right to apply to the courts to enforce its performance; and that private persons can only have or move for the writ of mandamus when it is the appropriate remedy to enforce some individual or private right.

The affidavit or petition on which the writ is asked states that the failure of the company to operate its road according to law "causes great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to the petitioners, who are merchants doing business in Council Bluffs, and who are constantly obliged to ship and receive goods transported over said road." This is the only special interest set forth by the prosecutors; and it was conceded by their learned counsel that the duty here sought to be enforced was a public duty, or at least one in the performance of which the re-

Hall v. Union Pacific Railroad Company.

lators had no more interest than any citizen who had frequent occasion to ship and receive goods over the respondent's road.

There is no legislation of congress specifically making it either the duty of the attorney general or the district attorney to institute proceedings like the present; and so the question whether they *must* be instituted by one of these officers, or *may* be instituted by private persons, and the writ moved for by private counsel, must be determined on general principles having reference in their application to the particular nature of the defendant corporation, and the particular duty which it is *here* sought to make it discharge.

The act of March 3d, 1873, gives to the proper circuit court jurisdiction in mandamus to compel the road to be operated according to law, but the act is silent as to who shall institute or set on foot the proceeding. This is more significant because as respects other duties and supposed liabilities of the company, the attorney general is expressly directed to institute the necessary legal proceedings to protect the interests of the United States. (Act March 3d, 1873, 17 Stats. at Large, 509; act of April 10th, 1869, 16 *ib.* 56.)

There is, therefore, as respects the duty of operating its road as one continuous line (which is the particular duty the performance of which is here sought to be compelled), no declaration of the will of congress as to who shall or may commence the necessary proceeding in mandamus.

It will conduce to a proper solution of the question before us to advert briefly to the character of the Union Pacific Railroad Company. It was chartered by congress and aided by money and lands. It is a private corporation in the sense that its capital stock is owned by the stockholders, who are declared to constitute the corporate body. Both from the title of the incorporating statute and from express declaration in the body of act (sec. 18), it appears that the

Hall v. Union Pacific Railroad Company.

object of congress in chartering and aiding the company, was to promote the public interest and welfare, and secure to the government the use of the road for postal, military and other purposes. The government has also a lien on the railroad and its property, to secure the bonds it issued to the company. By the act of July 2d, 1864 (18 Stats. at Large, 356, sec. 15) "the several companies are required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the *public and government are concerned*, as one continuous line."

Throughout the legislation of congress respecting this company, the fact is recognized that it sustains a special or peculiar relation to the United States in their political capacity and also a relation to the people at large or the general public. Now so far as the company owes duties to the general government of a nature to be enforced by mandamus, it is clear that private persons cannot institute or set on foot the proceedings. This would be a duty devolved upon the attorney general by express enactment, or resulting from his station. Such is not this case. And it may be admitted that where, as in the present instance, the duty charged to be neglected by the company is one which concerns the public at large as distinguished from the government, that the attorney general in his official capacity, alone, or on the relation of private persons, might file the necessary suggestion or affidavits and move for the writ.

. But where the duty said to be neglected is one which the company owes to the public, and where individuals who suffer from such neglect complain of it, must the court refuse the writ solely because the attorney general does not move for it? Upon principle and authority this question must, in our opinion, be answered in the negative. By the practice at common law "the writ is ordinarily obtained on the motion of counsel to the court of king's bench, at Westminster, during the term, supported by a suggestion,

Hall v. Union Pacific Railroad Company.

on the oath of the party injured (prosecutor) of his right, and of the denial of justice by the defendant, whereupon a rule *nisi* is made," etc. (Tapping, 5.) "The application to the court of B. R. for a rule for a writ of mandamus in all matters affecting the *public is ex debito justitiae*." * * * "Where, however, the right or power is of a private nature, as in the case of many officers, etc., in which the public are not primarily concerned, it is discretionary in the court, in the first instance, either to grant or refuse the application." * * * "In general all those who are legally capable of bringing an action are also equally capable of applying to the court of B. R. for the writ of mandamus" etc. (Tapping, 287, 288.)

It is clear that the affidavits upon which the writ is applied for may be made by any person cognizant of the facts, and those affidavits should not be entitled as of the cause, for none is yet pending, and the government only becomes a party in form when the writ issues. (Tapping, 413; *Haight v. Turner*, 2 Johns, 371; *People v. Tioga*, C. P. 1 Wend. 291.)

So that the question is reduced to this: Must the writ be applied for by the attorney general? And must it be refused in a case otherwise proper for it, unless this officer makes or sanctions the application?

A thorough examination of the English books has satisfied us that it is the constant practice of the queen's bench to entertain applications by private persons, on the motion of private counsel, for writs of mandamus to public officers and companies to enforce the performance of public duties. This is well illustrated by the case of *Rex v. The Severn & Wye Ry. Co.* 2 Barn. & Ald. 646, which, in principle, is analogous to the case at the bar. In the case just cited, upon the affidavit of a private prosecutor (Taunton), and on the motion of private counsel, without the presence or sanction of the attorney general, the king's bench granted a man-

Hall v. Union Pacific Railroad Company.

damus to compel the railway company to reinstate and lay down again the track which it had taken up; and the writ thus applied for was ordered on the distinct ground that the *public*, of which the prosecutor was one, and interested probably in the mines which the railway accommodated, had a right to the use of the road. See, also, *Rex v. Comrs. of Dean Inclosure*, 2 Maule & Sel. 80; *Rex v. Bristol Dock Co.* 6 Barn. & Cress. 181; *Clarke v. L. & N. Canal Co.* 6 Ad. & Ell. (N. S.) 898; *Reg. v. Falls, etc.* 1 Ad. & Ell. (N. S.) 636; *Reg. v. Trustees, etc. of Turnpike Road*, 12 Ad. & Ell. (N. S.) 448; *Reg. v. Archbishop of Canterbury*, 11 Ad. & Ell. (N. S.) 578. And on principle, where a statute enjoins a duty for the benefit of the entire public, why may not any one of the public injured by its non-performance complain of it to the proper court, and ask it to compel the observance of the duty? Why should such a person be forced to resort to the attorney general, and what is the necessity or propriety for vesting in this officer, whose general duties by reason of the peculiar structure of our government, are quite dissimilar to those of the officer of the same name in England, the sole power to determine whether a judicial inquiry shall be made concerning the discharge by a corporation of duties imposed upon it by law for the public advantage? What answer is it to the present relators to say, "Yes, you are injured by the company's neglect to discharge its duty, but as your injury is the same as that suffered by others, the court cannot hear or redress your complaint." But it may be objected to this view that if one person may apply and have the writ, so equally all may apply, and the result is that the defendant may be vexed with many applications, whereas if the attorney general or some public officer can alone apply, one suit only of the same character will be brought, and the result will be conclusive, both as respects the public and the defendant. An answer to the objection is that the granting of a writ of mandamus is discretionary with

Hall v. Union Pacific Railroad Company.

the court, and if a case is pending which will test the right or question in controversy, the court may for this reason alone refuse to entertain similar applications by other persons.

Besides, it deserves consideration whether a judgment in a suit in which the attorney general appears, concludes the public, to any greater extent than a similar judgment would in a mandamus proceeding instituted by a private relator, as in each case it is the writ which makes the government formally a party, and the form of the proceeding is the same.

There is some contrariety of opinion in this country whether private persons may be prosecutors or relators in a mandamus proceeding to enforce a public duty, but the decided weight of authority is in favor of the doctrine. The leading case asserting it is *The People v. Collins*, 19 Wend. 56, 1837, where the court, after an examination of the English decisions and practice, reaches the conclusion that in a matter of public right, any citizen of the state, may, where mandamus is the proper remedy, be a relator to enforce the execution of the common law or an act of the legislature, though it was admitted to be otherwise in cases of private or corporate rights, where the title or right of the relator to relief must appear. To the same effect see, also, *Hamilton v. State*, 3 Ind. 452; *Ottawa v. People*, 48 Ill. 233; *State v. County Judge*, 7 Iowa, 186, 202; *Ib.* 390, 397; *People v. Halsey*, 37 N. Y. 344, S. C. 53 Barb. 547; *State v. Railway*, 33 N. J. Law, 110; *Watts v. Carroll Parish*, 11 La. An. 141. *Dillon, Munic. Corp.* section 695, and cases cited. *State v. Turnpike Co.* 16 Ohio St. 308. *Contra*, *People v. University Regents*, 4 Mich. 98; *Sanger v. Commrs.* 25 Maine, 291; *Heffner v. Comm.* 28 Pa. St. 108—compare *Comm. v. Meeser*, 44 Pa. St. 341.

The right to institute mandamus proceedings by private prosecutors is likened by Judge COWEN to the right of pri-

United States v. Union Pacific Railroad Company.

vate persons to become relators in informations in the nature of *quo warranto*. *People v. Collins, supra*. In substance there is often much resemblance, but in England, an *information* proper, that is, the suggestion upon which the court acts, is filed by the attorney general as the appropriate officer of the crown, and unlike the affidavits in *mandamus*, the information cannot be made by private persons, though it may be and often is made upon their relation. While it is usual to join relators, it is not necessary. The object of joining them is that the defendant may not be oppressed, without remedy, by vexatious suits, since the relators are liable to costs, while the crown is not. Per Lord REDESDALE, in *Attorney General v. Dublin*, 1 Bligh, N. R. 312.

Reserving, as we do, all questions which concern the merits of the controversy, and in order, indeed, that the merits may be better understood, we think our discretion will be more wisely exercised by awarding than by refusing the alternative writ, particularly as in this way the opinion of the supreme court may more certainly be obtained than if the writ were denied.

ALTERNATIVE WRIT ORDERED.

NOTE.—See *Union P. R. R. Co. v. Hall*, U. S. Sup. Court, Oct. 1875.

UNITED STATES, ON RELATION OF HALL, *et al.* v. UNION PACIFIC RAILROAD CO.

The circuit court of the United States for the district of Iowa, under the acts of congress relating to the Union Pacific Railroad Company, has jurisdiction in *mandamus* to compel that company to operate its road as required by law, if any part of the road is in the district of Iowa; and under the act of June 20, 1874, service of process may be made upon the president or general superintendent of the company, found in the district of Iowa.

(Before DILLON and LOVE, JJ.)

United States v. Union Pacific Railroad Company.

Federal Court.—Jurisdiction.—Union Pacific Railroad Company.—Service of Process.

THE alternative writ of mandamus awarded at the last term was served upon the president and general superintendent of the company at Council Bluffs, in this district.

The marshal's return on alternative writ of mandamus is as follows: "This writ came into my hands on the 10th day of June, A. D. 1874, and on the same day I served the same on Sidney Dillon, president of the within named defendant, the Union Pacific Railroad Company, at the transfer grounds of said company, in the city of Council Bluffs, county of Pottawattamie, Iowa, by delivering to him a true copy thereof, and offering to read to him the within writ, which he then and there waived, and on the same day I served the within writ on S. H. H. Clark, general superintendent of the within named defendant, the Union Pacific Railroad Company, by delivering to him a true copy thereof, and offering to read the original, which he then and there waived; all done at the transfer grounds of said Union Pacific Railroad Company, in the city of Council Bluffs, Pottawattamie county, Iowa."

The company made a special appearance, and excepted to the sufficiency of this service, and moved to quash the same.

In support of the motion, the following affidavit was filed:

A. J. Poppleton, being duly sworn, says, that for several years last past, he has been, and now is, the attorney of the Union Pacific Railroad Company, defendant in this action. That said corporation is created by, and organized under, a law of the United States; that, by a certain joint resolution of congress, passed and approved April 10th, 1869, the stockholders of said company were authorized to establish their general office at such place as they might select at a

United States v. Union Pacific Railroad Company.

meeting to be held in the city of Boston, April 22, 1869; that at such meeting, said city of Boston was by said stockholders selected, and its general office established in said city, where it has ever since remained. That in said city, in the state of Massachusetts, all the meetings of its board of directors are held, and its books and records kept, and that all its officers are residents of said city, except its president, who resides in the state of New York; that it has no other office or place where its legislative corporate power is exercised; that its managing office, where the power and authority of its managing agents, to-wit: Superintendent, auditor, cashier, general freight and ticket agents, are exercised and wielded, is in the city of Omaha and state of Nebraska, and it has no general managing office elsewhere; that the alleged service of the writ in this action was made on Sidney Dillon, president of said company, while casually traveling through the district of Iowa, he being at the same time a resident of the city and state of New York, and that defendant has and owns no railroad situated in the state of Iowa, except such portion of the iron track laid over and across its Missouri river bridge and the approaches thereto as are east of the boundary line between the states of Iowa and Nebraska.

That said S. H. H. Clark, general superintendent, upon whom said alleged service was also made, resides, and has his office at Omaha, Nebraska, and that neither the said Dillon, president, nor Clark, superintendent, resides or has an office in the state of Iowa.

A. J. POPPLETON.

Subscribed and sworn to by A. J. Poppleton, before me
October 13th, 1874.

GEORGE B. CORKHILL, clerk.

John N. Rogers, for the relators.

J. M. Woolworth, and *A. J. Poppleton*, for the railroad company.

United States v. Union Pacific Railroad Company.

DILLON, *Circuit Judge*, on overruling these exceptions, and orally delivering the judgment of the court, in substance said :

This is a proceeding instituted by certain persons residing in Council Bluffs, in this state, who claim that they are aggrieved by reason of an alleged failure of the Union Pacific Railroad Company to operate its road according to law.

The 15th section of the act of 1864, which was an act amending the original charter of this company—giving it additional subsidies and additional grants of land—by means of which in reality the road was subsequently constructed, provided that it should be the duty of the company to operate its road, so far as the government and the public were concerned, as one continuous line.

In this case it is alleged that the company refuse to operate their road as a continuous line; that in fact they operate it as one continuous line as far only as the city of Omaha, and there break its continuity by the agency of a distinct and separate transfer from that point to the Iowa side. This is the complaint which the relators make, and which they allege to be in violation of the terms of the charter of the company and its duty to the public. 2 Dillon C. C. R. 527.

In 1873, congress passed an act in these words: "The proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the said Union Pacific Railroad Company to operate its road as required by law." This was an act which was indispensable in order to give the federal court original jurisdiction in mandamus, and was passed for that purpose. 2 Dillon, 527. This proceeding heretofore came before us on two questions. The one was, "Whether private persons could move for the writ; that is, could institute the proceeding to compel the road to perform its public duty, or whether the proceeding must not be instituted by the at-

United States v. Union Pacific Railroad Company.

torney general." We have decided at the last term, that the writ was well moved; that if private persons could show that they were interested in the operation of the road, they had a right to come into court under this act and call the company to account for failing to perform its public duty, to their injury, and thereupon awarded the alternative writ.

On the other question, whether the circuit court of the district of Iowa was the "*proper* circuit court" before which to bring this proceeding, we gave no opinion. The act of June, 1874, makes an addition to the 15th section of the act of July, 1864, and provides that there shall be added to it the following words: "Any officer or agent of the company who is authorized to construct the aforesaid road, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph lines under his control or which he is engaged in operating, for purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, and without discrimination of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined and imprisoned."

This act makes it the personal duty of the officers of the road to operate it as one continuous line. Now, if it can be shown that the president of the road is not operating it as a continuous line, within the meaning of this act of congress, then he is guilty and may be punished, and we do not think for the violation of the act in this respect he can be protected by any resolution of the board of directors. The law says: "You shall operate this road as one continuous line," and enjoins this duty upon the officers of the road. In the next sentence the phraseology changes: In case of failure or refusal of the Union Pacific Railroad, or either of said branches, to comply with the requirements of this act and the act to which this is amendatory, an action against

United States v. Union Pacific Railroad Company.

them may be brought in the district or circuit court of the United States, in the territory, district or circuit in which the road or any portion of it may be situated, for damages on account of such failure or refusal. The action must be brought in the court of some district in which some portion of the road of the defendants is situated.

Now in this proceeding it is alleged that a portion of the road which this company refuses to operate as one continuous line, is situated within the geographical limits of the state of Iowa. On this motion we must take this to be true. The act of 1874 provides, that if process in any suit is served upon any agent of the defendant found within the territory, district, or circuit in which such suit may be brought, such service shall be held by the court to be good and sufficient. In this case the alternative writ of mandamus was served upon the president and the general superintendent of the company at Council Bluffs, in this state, and the question is, whether this is a sufficient service to give this court jurisdiction, assuming that some portion of the road of the defendant is in this district, and assuming that the road is not operated as required by law. It is of course to be regretted that the phraseology of the act is not so clear as to admit of no controversy; and yet, when we consider that it is our duty to carry out the intention of congress, so far as we can learn it, it does not seem to us that it admits of very much doubt that this is, upon the assumptions above mentioned, a proper circuit court.

The writ of mandamus may go to the corporation, to the corporate body, and command it to perform its duty (granting that any part of the road is in this district), and if the writ, thus commanding this duty, is served upon the chief officer of the corporation, its president, or upon any officer who may be indicted and criminally punished, if he fails to do his duty in this respect, then it seems to us the court has jurisdiction over the company and its officers, by man-

United States v. Union Pacific Railroad Company.

damus, to compel the performance of this duty. This writ may, perhaps, run also, under the act of 1874, to the president of the company: "You are hereby commanded to operate the road as one continuous line."

Under this act, this is a duty which he can and should perform. He can be criminally punished if he does not perform it, and it is no protection to him that the board of directors has ordered him to do something else. The writ of mandamus may be served upon him, and he is obliged to respond to it, whether it be regarded as a proceeding against him as an officer, or whether it be regarded as against the corporation. The argument is this: The act of 1874 enjoins the duty to operate the road as one continuous line, upon the officers engaged in operating the road; if they refuse to do so they are made indictable. The duty to be performed by them is one which rests upon the officers as well as the corporation; otherwise congress would not have made it criminal for the officers to refuse to discharge it. It is their duty to obey the law; if they fail they may be proceeded against criminally, and the public duty may be enforced by mandamus, and this writ may be directed to the corporation and served as required by the act of June 20th, 1874, or perhaps to the president or officers who are made subject to indictment under that act, and served upon them if found within the district. Whether any portion of the road of the company is within this district, and whether the transfer between Omaha and Council Bluffs, by means of the "Omaha Bridge Transfer," which is the subject of the relators' complaint, is in violation of the duty of the company or its officers, as enjoined by law, are questions which are not passed upon on the present motion.

And again, considering that the original charter of the company, as well as the act of March 3d, 1873, provided no mode of service, and that the act of 1874 was designed to enforce the duty enjoined by the 15th section of the act of

United States v. Union Pacific Railroad Company.

1864, all these acts are to be construed as *in pari materia*, and thus regarded, any proceeding or suit to enforce the duty enjoined by the 15th section, may be instituted in the proper court, and the proper court, as prescribed by the act of 1874, is one in the district in which some part of the company's road is situated, and in any such proceeding or suit, the process may be served upon the company's agents found in the district, and in this proceeding by mandamus, our judgment is, that service of the writ upon the president or any officer whose duty it is to see that the road is operated as required by law, is sufficient. Exceptions to service of alternative writ overruled.

EXCEPTIONS OVERRULED.

LOVE, J. concurs.

NOTE.—See *Union Pacific R. R. Co. v. Hall*, U. S. Sup. Court, Oct. term, 1875.

APPENDIX.*

UNITED STATES v. RUDOLPH W. ULRICH.

1. The sections of the Revised Statutes under which the indictments were drawn, continue in force, notwithstanding a later act, prescribing a different punishment. The Revised Statutes contain a general provision modifying the common law doctrine in this respect, which is construed and applied.
2. Requisites of indictment against distiller for conspiracy to defraud the United States of the internal revenue tax, considered ; and held not essential to state, in addition to an intent to defraud, the facts showing such intent.
3. Where the charge is of an *attempt* to defraud, the pleader should specify some acts which constitute the attempt.
4. A count for the removal of distilled spirits from the distillery to a place other than the distillery warehouse, held sufficient.
5. Under the legislation of congress (Rev. Stats. sec. 3,224), an indictment for failing to efface, etc. marks and brands at the time of emptying the cask or package, need not aver a *criminal intent*.
6. So as to a person having in his possession tax-paid stamps once used. In the cases last mentioned, congress has not made criminal intent an element of the offences.
7. Whether the punishment is limited to the person who actually empties the highwines, or extends as well to his employer, *quære?*

(Before MILLER and TREAT, JJ.)

Two indictments were found against the defendant, the nature of which appears in the following opinion given by the Circuit Justice, on demurrer, at the September term, 1875. The opinion was orally pronounced, and is reported from the short-hand notes taken at the time.

* In the Appendix are included cases mostly decided since the previous portion of the volume was in print.

United States v. Ulrici.

Mr. Dyer, district attorney, *Mr. Henderson*, *Mr. Eaton*, and *Mr. Bliss*, for the United States.

John W. Noble, for the defendant.

MILLER, *Circuit Justice*.—These are two indictments found against one Ulrici, and have been submitted to the court upon demurrers. I will now proceed to consider them, and to pronounce the decision of the court upon the questions which have been raised.

To facilitate the consideration of these questions, I will divide the objections into two classes: First, those urged against both indictments, and, second, those made to the several counts respectively.

1. In the first place, it is contended that the act of 1875, having prescribed a different punishment for the offences charged in these indictments, the sections of the Revised Statutes, under which these indictments have been drawn, are repealed, inasmuch as the later act contains no saving clause.

In answer to this, I would observe that the 13th section of the Revised Statutes contains a general provision changing, as I conceive, the rule of the common law, that a statute modifying the punishment of a crime prescribed by a prior law operates as a repeal of that law. There is no doubt that that general proposition is sound.

Any statute that varies the definition or the punishment of an offence abrogates the former statute; and no offences committed under it can, by a well-known principle of the law, be punished, unless the later act contains a saving clause. But, as I remarked, the Revised Statutes changed this rule of the common law. They were intended to change it, and it is only the extent of the change which is here questioned.

Section 13 provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty,

United States v. Ulrici.

forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force, for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Now the counsel for the defendant argues that neither the word "penalty," "forfeiture," nor "liability," is equivalent to the word "punishment," and, therefore, that the section under which these indictments are drawn is repealed, unless the penal sanction is comprehended by the term "penalty," and this, he insists, means only that which can be enforced by a civil action; or, by the term "forfeiture," which relates merely to property; or, by the term "liability," which, he says, means merely subject to a civil proceeding. But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by congress to include all forms of punishment for crime; and, as strong evidence of this view, I found, during the progress of the argument, and called the attention of the counsel to a section, which prescribed fine and imprisonment for two years, wherein congress used the words: "Shall be liable to a penalty of not less than one thousand dollars, * * * and to imprisonment not more than two years." Moreover, any man using common language might say, and very properly, that congress had subjected a party to a liability, and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word "liability" is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country. Besides, as my brother TREAT reminds me, the word prosecution is used in this section, and that usually denotes a criminal proceeding.

United States v. Ulrici.

2. I will now proceed to consider the first indictment, which contains three counts. The first count is objected to on the ground as it stands, that it contains merely a naked presentation of an offence which is denounced and made punishable as a felony without any averment of those acts which are necessary to show what the felony really was.

Now, let us inquire whether it is liable to this objection. It sets out that the defendant did engage in and carry on the business of a distiller, at his distillery situated in the city of St. Louis, with intent, then and there, to defraud the United States of the tax due upon each and every gallon of one thousand proof gallons of spirits thereafter to be distilled by him.

Now, what he was doing is set out with sufficient particularity. It is alleged that he was carrying on the business of distiller at a particular place and at a particular time, and, while so engaged, conceived the intent, then and there, to defraud the United States. It is contended that there should be some statement of the evidence of this intent—that some one or more of the facts which manifest this intent should be set out in the indictment; but I suggested to counsel at the time, that, if he could show where it was necessary to describe more than what the party intended to do, in a case where intent was the essence of the crime, then this might not be considered a sufficient charge, but I apprehend that no such instance can be produced. Of course, you must show that *what* the party intended to do was criminal, because the offence is something which the law itself says he should not do. And that seems to have been done here. It is charged that the accused intended to defraud the United States of taxes upon the whisky he himself produced; that that tax was an internal revenue tax of seventy cents imposed upon every gallon distilled by him. But, it is said that you must show *how* he was going to do it. Now, an intent is often very hard to prove, but when you show

United States v. Ulrici.

that it is essential to a civil or criminal proceeding, you can demonstrate it in a thousand ways. All human actions are the external evidence of intent. The conduct of a man, in its thousand various forms, goes to discover his inner thoughts. And, to say that the indictment should allege these with particularity, would be very difficult for the pleader. Are we to set all the facts out? If not, where is the limit to be fixed? The objections, therefore, to this count are overruled, and it is held to be good.

3. Little was said specially upon the third count of this indictment, and yet, upon examination, we consider that there is a want of particularity in that. It is charged that, Ulrici being engaged in the business of distilling at this place, did, while so engaged, *attempt* to defraud the United States of the taxes imposed by law. Here the objection is good, for this indictment says nothing about intent. I think the defendant in this cause is entitled to have it shown what he did, or how he attempted to defraud. When you say that he attempted to defraud the government, I think it is your duty to specify some acts which constitute the attempt. We therefore hold the third count to be bad.

4. I come now to consider the fourth count. It is very different from the others. As we construe it, it is a count for the removal of distilled spirits from the distillery to a place other than the distillery warehouse. The gentleman who defended this count did not so understand it. He treated it as an indictment of the defendant for having in his possession the mash, still and other apparatus, with intent to defraud. This is the offence which, it has been said, is charged in this count. But it does not stop here. It goes on to aver that the said Ulrici, then and there carrying on the business of a distiller, did remove a large quantity of distilled spirits from the place where they were manufactured, to a place other than the distillery warehouse. This we conceive to be a good indictment for the removal,

United States v. Ulrici.

but not for having the distillery apparatus in possession with intention to defraud the government.

It was strenuously urged that the charge for the removal is well stated, as also having stamps, &c., in possession with fraudulent intent, and that, therefore, two distinct offences are alleged in the same count, and, consequently, it is bad. We concur in the opinion that the allegation of the removal is sufficient, and constitutes a complete crime; but we, at the same time, consider that the first averment may be properly treated, as inducement, as descriptive of the character of the person charged. It may be that there is a different punishment prescribed for a distiller committing this offence from that provided for others; if so, it was proper to describe him, in order that he might be subjected to that particular punishment. There is certainly a distinct punishment prescribed for a store-keeper committing this crime, and, if this were an indictment against Ulrici as a store-keeper, it should certainly recite his employment as such. The count, therefore, is adjudged good for the offence of wrongfully removing distilled spirits. This disposes of this indictment.

5. The other indictment presents far more serious questions, which have caused us much more difficulty in deciding.

The first count in this indictment (leaving out the formal parts, such as the venue, the date, etc.), charges that the defendant did empty and draw off, and cause to be emptied and drawn off, so many thousand gallons of distilled spirits, contained in so many barrels, which barrels bore a tax-paid stamp to denote that the tax due the United States had been paid, "and did feloniously then and there fail, at the time of emptying and causing to be emptied and drawn off, the said contents of said barrels, to efface and obliterate from each of said barrels the said stamp," &c.

The objection to this count urged by the counsel for the

United States v. Ulrici.

defence, and which, we think, had a good deal of force, is, that it is nowhere charged that the offence was committed intentionally or fraudulently; that is to say, that the failure to erase the stamps, which is the essence of the crime (for anybody has a right to empty a barrel of highwines after the tax is paid), is not charged to have been done intentionally or fraudulently, and that, on the contrary, it might have been done by any honest purchaser of the whisky procured from the distillery, and this either carelessly, or absolutely without knowing the obligation imposed upon him by law. It certainly was truly said, that, unless there was some criminal intent, or some fraudulent purpose in the failure to erase these stamps, it was a great hardship that a man should be punished as a felon and disgraced in public estimation by imprisonment, and all for doing that, with no intent whatever to cheat or defraud or do harm to any one. The act might have been done in ignorance; it might have been done in negligence.

This section, No. 3324, is one which, in the Revised Statutes, and, I think, in some revision of the internal revenue laws prior to these, was intended to condense into one paragraph a description of offences, and a denunciation of penalties which had before been scattered in various enactments, and distributed in various parts of the revenue law. It speaks of the offence of emptying casks of distilled spirits, with stamps upon them, in two different places, and leaving out all other offences contained in the section, I will collocate what is said on this particular subject:

“Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package, bearing any mark, brand or stamp required by law, shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp or brand.” That is the obligation of everybody. Then comes one provision in the event that is not done. “Every such cask or package

United States v. Ulrici.

from which said mark, brand or stamp is not effaced and obliterated, as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found." That is the penalty denounced upon the cask itself. Then there follow several other offences; and finally we come to the penalties applicable in this case: "Every person who fails to efface and obliterate said marks, stamp or brand, at the time of emptying such cask or package, * * * shall be deemed guilty of a felony, and shall be fined not less than \$500, nor more than \$10,000, and imprisoned not less than one year, nor more than five."

Now, it is obvious, from what I have read, that the statute itself nowhere requires in express terms that the party who failed to efface or obliterate these stamps should have done it intentionally or fraudulently. The punishment is denounced against the simple failure, and such failure is declared to be a felony, and the party is subjected to the punishment appropriate to a felony.

It is very well understood, both by the courts, and by the profession, as well as every one interested in the matter, that the collection of the internal revenue tax in this country has required a system of legislation for its enforcement harsh beyond everything known to our history. And it is equally well understood that, harsh as these measures are, they have been far from successful. Notwithstanding the heavy penalties denounced against crimes which go to defraud the government of its revenue from internal taxes, and notwithstanding the minuteness and particularity in the description of these crimes, and notwithstanding all the aids which congress has given by legislation to the enforcement of the revenue laws, they have been very imperfectly executed, and that the government is cheated out of perhaps one-half of its revenue, especially that from the tax on whisky and tobacco. It is not contended that the legislature

United States v. Ulrici.

has not power to make this omission or failure a felony. It is not denied that it was within their province to adopt measures as severe as this, but it is argued that, in all cases, where an act is made a felony, that a felonious intent is essential to the commission of the crime. At common law, that may be true, but congress and the state legislatures, in defining and punishing crimes, are above the common law. They have a right to change it, and the progress of society has developed the necessity of doing it very often ; so that, in fact, there is hardly an offence existing to-day in this country which is punished in the state courts as a common law crime. And none whatsoever exists now, or ever did exist, punishable as such in the United States courts.

The question is, then, narrowed down to this : Did congress intend, in this provision, declaring and punishing the failure to efface these stamps, at such time, as a felony, that a criminal intent should be necessary ? We see nothing in the language of the statute requiring such an intent. On the other hand, we do see very much in the whole system of legislation on internal revenue showing that congress did not make intent a necessary ingredient in the crime. In their first enactments on this subject, they ignored the intent, and, very frequently in the course of their legislation concerning it, they denounced acts as crimes where the intention to do wrong constitutes no part of the offence. If such legislation be wise, or permissible at all, it is precisely in this class under consideration, where one would suppose that congress intended to create the offence, without making the *scienter* essential ; for this *failure* itself exposes the government to fraud, just as well, and just as efficiently, whether it be intentional or unintentional. An empty cask, with this live evidence upon it, that the tax upon the liquor has been paid, is perhaps the most fertile opportunity to cheat the government out of its revenue. In-

deed, this stamp regulation is as complete to protect the government as any that has ever been devised by human ingenuity, for an empty cask, with a stamp upon it, bears the evidence that the whisky afterwards put into it has duly paid the tax to the government. In various ways congress has shown a lively sense of the necessity of securing the revenue against this mode of cheating, by the use of barrels which bear the evidence that any liquor with which they may be filled has paid the tax. Those stamps had been already used, and ought to have been destroyed. Congress, therefore, saw fit to subject to very heavy penalties all persons who, either through carelessness or intentional conduct, thus exposed the government to be defrauded.

But this is not all. The decision does not rest alone upon this reasoning. The section under consideration contains a description of other offences, in which the intent is made indispensable to the completion of the crime, and there is no reasoning more often referred to, or more forcible, than that, when in the same section, an element is required in one case, and is left out in another, the omission was intentional; the legislature intended it. Now, right in the middle of this section, and in this connection, congress describes an offence where the intention is made a necessary ingredient; the language is this: "And every railroad company, or other transportation company, or person, who receives or transports, or has in possession with *intent* to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark or stamp, required by law to be placed on any cask or package containing distilled spirits, shall forfeit," etc. Now, why should congress say that, as to you, who failed to efface these stamps, no intention is required; but, as to the man who has possession of these casks, such possession must be accompanied

United States v. Ulrici.

with a criminal intent. He must intend to transport them. It seems to me so clear that congress intended this distinction, that I hardly think it necessary to argue it.

So we come now to the punishment. I have given the descriptions of the offences. In one case, intent is necessary, and in the other it is not. This is the concluding language of the statute: "Every person who fails to efface and obliterate said mark, stamp or brand, at the time of emptying such cask or package, or who receives any such cask or package, or any part thereof, with the intent aforesaid, * * * shall be deemed guilty of a felony." We can not conclude, however harsh it may seem, that congress intended that a criminal intent should be averred in a charge for failure to destroy the stamps.

Nearly the same question is raised, and the same argument applies, with equal force, as to the second count, which charges the defendant with having in his possession tax-paid stamps, once used. But I shall not go over this whole argument again. It will be perceived, on reading the statute, that no intent is necessary. "Every person who has in his possession any such stamp, so removed as aforesaid, or has in his possession any cancelled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony." No intent is necessary here.

It is argued that any man might have in his possession these stamps, however innocent, and that seems to me the strongest argument made. But, on looking carefully at the internal revenue laws, it appears very obvious, in view of the manner in which these stamps are affixed, that no man can have possession of them without knowing their character. They are not new stamps, they are stamps that have been once used, and the officer who places them upon the casks puts marks and names and numbers upon them,

 United States v. McDonald.

which are conclusive evidence that they have been used. Congress obviously had that view of the subject, and we do not think you can import the intent into the statute as framed. Consequently it is not necessary to allege it in the indictment. This proposition extends to all the counts in this indictment, and the demurrer is overruled.

Before I close, I will call the attention of the counsel to a case in 8 Howard, 41. This whole question of the allegation of intent is discussed, especially when the statute denounces the intent, and makes it a part of the offence.

Judge *Krum*: If the court please, as this is the first time this statute has been construed in this district, I would inquire whether your honors intended that the punishment as for a felony is to be limited to the person who actually empties the highwines, without destroying the stamps, or extends to those who employ him?

Justice *MILLER*: We have not felt called upon to decide that question.

JUDGMENT ACCORDINGLY.

 UNITED STATES v. JOHN McDONALD, *et al.*

1. Under the legislation of congress, an officer of the internal revenue, named as such in the indictment, cannot be jointly indicted for a conspiracy to defraud the revenue, with private persons.
2. The doctrine of *merger* does not apply to misdemeanors; and the present indictment held good, though it charged a completed offence, in addition to a conspiracy to commit it.

(Before *MILLER* and *TREAT*, JJ.)

Criminal Law.—Conspiracy.—Joinder of Officials and Private Persons.—Merger.

CERTAIN internal revenue officers were joined in an indictment with distillers, charged with a conspiracy to de-

United States v. McDonald.

fraud the government of the tax on distilled spirits. The indictment alleged not only a conspiracy, but also in executing it that a completed offence had been committed. Demurrer was interposed, and was brought on for hearing before MILLER and TREAT, JJ. It was objected, in support of the demurrer, that officials and private persons could not be joined, and that the offence of conspiracy was merged.

Mr. Dyer, district attorney, and *Mr. Henderson*, for the United States.

Mr. Krum and others, for the defendants.

MILLER, *Circuit Justice*, in deciding the demurrer, in substance said: We think the objection, as to the joinder of officials and private persons, is well taken. This difficulty, however, may be avoided by the action of the district attorney. The Revised Statutes clearly make the offence committed by a class of one character, widely different from the same offence, when committed by persons of another character. Section 3169 declares that where the officers of the government conspire to defraud the United States of the internal revenue tax, they shall be sentenced to a dismissal from office; moreover, it prescribes a different and more severe punishment in the way of fine and imprisonment, than section 5440, where a private individual, and not an officer of the government, is the offender, for he is under no such special honorable obligation to protect the government, though it is, of course, a dishonorable act in anybody to cheat the government.

All the world over, those who have a trust reposed in them, are held to a more rigid accountability than others, and a violation of that trust is punished more severely when committed by them than where no such special trust is reposed. This, then, is a good indictment as against the officers of the government. It is equally a good indictment

United States v. McDonald.

against those who are not officers; but it is not a good indictment as against both the officers and the others. It is in the power of the district attorney to cure this fault by dismissing the indictment either as to the officers or as to the private individuals; but he can have no trial as to all the parties upon the indictment as it now stands.

District Attorney *Dyer*: With reference to indictment No. 667, the government will enter a dismissal as to those who are not officers, and proceed against those who are officers. The same offences charged in that indictment as overt acts committed in presence of, and as evidence of the conspiracy on the part of the distillers, form grounds for separate indictments already pending in the district court.

MILLER, *Circuit Justice*: The district attorney will prepare and file a paper over his own signature to that effect.

As to the question of *merger*.

After having charged the conspiracy against all of these parties to cheat the government in various ways, and having also gone on and specified twenty or thirty distinct acts, each committed by one or by several of these parties, some of which acts are undoubtedly made felonies, the indictment concludes by charging, after all these overt acts are set out and a long history given, that *all* the defendants did cheat and defraud the government. So that, in fact, there is a charge of conspiracy to cheat and defraud the government, accompanied by a charge that the defendants—*all* the defendants—did cheat and defraud the government; and it is a fact that the law provides distinctly for the punishment of these two distinct offences. An examination of the authorities, as careful as we have been able to make, leads to a strong inference that the minor offence of misdemeanor may, in certain cases, be merged in the higher offence of felony. Yet it is everywhere conceded that one misdemeanor cannot be merged in another misdemeanor; and this, upon the ground that,

United States v. McKee.

by the division of offences into felonies and misdemeanors, the higher grade swallows up the lower—that which constitutes a part of it—and subjects the person that perpetrates it to a more rigorous punishment. The doctrine of *merger*, therefore, does not apply as between misdemeanors themselves, although one may be a step in the progress of the execution of another. Consequently we hold that this indictment is not subject to the doctrine of *merger*, and that it is a good indictment, provided that the district attorney avoids the difficulty I have mentioned, by electing to dismiss, either as to the officers, or as to those who are not officers.

ORDERED ACCORDINGLY.

TREAT, J., concurs.

THE UNITED STATES v. WILLIAM MCKEE.

1. On the trial of an indictment for a conspiracy to defraud the government out of internal revenue taxes, where a conspiracy has been proven, and there is evidence connecting the defendant therewith, and one of the conspirators has testified to the fact that, at the end of every week, he gave to a co-conspirator certain moneys, the gains of the conspiracy, it is competent to show by the witness what directions he gave to such co-conspirator as to paying or delivering the money to the defendant.
2. In such case, the subsequent declarations of such co-conspirator, as to what he did with the money so paid to him, are admissible as a part of the *res gestæ*, but not for the purpose of connecting the defendant with the conspiracy, and the jury should disregard it, unless they should be of opinion that the defendant has been connected with the conspiracy by evidence *aliunde*.
3. In determining whether there has been sufficient evidence of a conspiracy to warrant, as against the defendant, the admission of evidence of the acts and declarations of the alleged conspirators, the court is not at liberty to reject the uncorroborated testimony of self-confessed accomplices and members of the conspiracy. Nor can the court declare, as matter of law, that such testimony is unworthy of

United States v. McKee.

belief, unless corroborated. The credibility of such testimony is a question for the jury, under the advice and direction of the court, and is not a question of law for the court.

(Before DILLON and TREAT, JJ.)

Criminal Evidence.—Declarations of Co-Conspirators.—Uncorroborated Testimony of Accomplices.

INDICTMENT for conspiring to defraud the government out of taxes on distilled spirits. Megrue, a conspirator, who had previously pleaded guilty, being on the witness stand, and having testified that, at the end of each week, he turned over a portion of the gains of the conspiracy to Leavenworth, a co-conspirator, since deceased, was asked by the attorney for the government whether he paid the money to Leavenworth, with directions to pay it to the defendant. The question was objected to, and the objection was argued at great length by

Chester H. Krum and Henry A. Clover, in support of it, and by

James O. Broadhead, Lucien Eaton, and D. P. Dyer, contra.

DILLON, *Circuit Judge*.—Evidence by several witnesses has been given, tending to show a conspiracy between certain distillers in the city of St. Louis and the revenue officials, to defraud the government, from week to week, of the tax on distilled spirits produced at their distilleries.

The statements of the witnesses are that the government was to be defrauded out of its tax in this way, viz: One-half of the tax on each gallon was to be retained by the distillers for their share of the fraudulent gains, and the other half was to go to the revenue officers and the other conspirators.

The scheme did not contemplate a single fraudulent act,

United States v. McKee.

confined to one distillery, but extended to nearly every distillery in the city, and was to continue for an indefinite period. This scheme is testified to by Megrue, Fitzroy, Engelke, and Thorpe, all of whom confess themselves to have been members of the conspiracy, and to be under indictment for these frauds. All of these witnesses have given evidence, which, if true, tends to implicate the defendant as being in the conspiracy, which commenced in 1871, and continued until May, 1875, when the distilleries were seized and criminal prosecutions soon afterwards set on foot.

Megrue testifies that he took charge of the illegal organization about September, 1871, and that he received weekly, every Saturday, from the distillers in the organization, the amount of "stolen tax," as he styles it, and disbursed the half of it, received by the witness, to certain parties as follows: "The money left after paying gaugers, store-keepers, etc., was divided by the witness into five packages; one-fifth was given by the witness to McDonald (supervisor of internal revenue); one-fifth was kept by the witness, and two-fifths was given by the witness to one John Leavenworth, a gauger, since deceased." The share of the witness, between September, 1871, and November, 1872, he states to have been about \$50,000 or \$60,000.

It is now proposed by the government to ask the witness, Megrue, what directions he gave to Leavenworth as to the disposition of the packages containing the two-fifths; that is, it is proposed to show that he was directed at the time by Megrue to pay it to the defendant and the collector of internal revenue, and to show, furthermore, the subsequent declarations of Leavenworth to the witness, that the money intended for McKee (the defendant) had, in fact, been paid McKee by Leavenworth.

This testimony is objected to by the counsel for the defendant.

1. It is objected that the government cannot show by the witness what directions he gave to Leavenworth *at the time*, as to paying or delivering money to the defendant. This was during the conspiracy—was the act of two of the conspirators in the carrying out of the conspiracy, and is, in our judgment, clearly competent. Indeed, this objection was practically abandoned on the argument; at least, not insisted on.

2. But it is stoutly objected that the *subsequent declarations* of Leavenworth to Megrue, as to what he had done with the money received from Megrue, is incompetent for any purpose against the defendant.

We have had the benefit of a discussion at the bar rarely surpassed in the ability and learning displayed on either side, and the authorities have been extensively reviewed. We content ourselves with stating our conclusions, which rest largely upon the circumstances of this case as it now stands upon the evidence, particularly with respect to the *continuous* nature of the conspiracy. The general rule of law is undisputed, that, when a conspiracy is shown to exist, all acts done, and all declarations made to advance the common cause, or made in connection with acts done in furtherance of the conspiracy, by any one of the conspirators, are admissible against all. Megrue and Leavenworth were conspirators; and the conspiracy was not at an end.

If the testimony of the witnesses, all of whom are accomplices, is to be credited, it tends to show that McKee was in the conspiracy. What took place between Megrue and Leavenworth, in reference to the distribution of this money, from week to week at the different times when the money was delivered by the one to the other, seems to us part of the *res gestæ* of the transaction, and admissible as such, to show and explain the acts of two of the conspirators. It does not seem to us to be the same as if the declarations of Leavenworth had been made to third persons, or had been made after the conspiracy had ended.

United States v. McKee.

We think the declarations of Leavenworth made to Megrue, as to what he did with the illicit money previously received, are competent to explain the act of receiving other like funds continuously, from week to week, and to show the relations of these persons to the transaction, and to each other. But, unless the defendant is otherwise connected with the conspiracy, such declarations on the part of Leavenworth, to the effect that he had paid money to the defendant, cannot be used to establish the fact that the defendant did receive money. In other words, that must be proven by evidence *aliunde* the declarations; that is, the fact of the conspiracy, and the defendant's connection therewith, as a guilty participator therein, must be proved, by independent evidence, before declarations of the alleged conspirator can be considered as evidence against another not present when the declarations were made.

If the jury shall find the proof of the defendant's alleged connection with the conspiracy fails, it will be their duty not to consider any declarations of Leavenworth not made in defendant's presence, for the purpose of showing his complicity with the conspiracy. The mere declarations of an agent cannot prove his agency or authority to bind another.

3. It is also objected, and there is no evidence sufficient to be submitted to the jury to show the connection of the defendant with the alleged conspiracy. It is not denied that the evidence of Megrue, Fitzroy, Engelke, and Thorpe (these being the only witnesses examined so far), if true, would establish this sufficiently to be laid before the jury for their consideration. But, it is insisted, that, as they are all confessed accomplices, and under indictment as such, that their uncorroborated testimony will not justify a conviction, and, hence, should not be considered by the court as a sufficient evidence of a conspiracy to warrant, as against the defendant, proof of the acts and declarations of the alleged conspirators.

 United States v. McKee.

We recognize the danger of a conviction resting alone on the unsupported evidence of confessed accomplices, and if, when the testimony is closed, those accomplices are not corroborated, we shall state the law, in this regard, to the jury, as we understand it. It were premature to decide it now. But the position taken that the court can pronounce, as a matter of law, that the evidence of an accomplice is not worthy of any belief or credence, except so far as corroborated, cannot be maintained, especially in view of the legislation of congress which compels accomplices to testify. Accomplices are competent witnesses; and, in our system of jurisprudence, the credibility of all witnesses, accomplices as well as others, is for the jury, and not the court—for the jury under the advice and direction of the court. The proposition maintained, in this respect, by the counsel for the defendant, would substitute the court for the jury, and would be an invasion of the province of the latter, which is without any well-established precedent.

TESTIMONY ADMITTED.

TREAT, J., concurred.

 THE UNITED STATES v. WILLIAM MCKEE.

1. The extent and nature of the conspiracy formed in 1871 and continuing until 1875, in the city of St. Louis, to defraud the government out of the tax levied upon the production of distilled spirits, stated.
2. When and for what purpose the declarations of a conspirator can be admitted in evidence against the defendant, on an indictment charging him with complicity in the conspiracy.
3. The substance of the testimony relied on by the government to show the defendant's connection with the conspiracy, stated.
4. The weight due in the law to the testimony of confessed conspirators and accomplices, stated; and the rules of law laid down in respect to the power of juries to convict on such testimony when not corroborated.

United States v. McKee.

5. The defendant's previous good character ; for what purpose it is to be considered by the jury, and to what extent available to the defendant.
6. What constitutes a reasonable doubt in a criminal case, defined.

(Before DILLON and TREAT, JJ.)

Conspiracy to Defraud the Government out of Internal Revenue.

DILLON, *Circuit Judge*, charged the jury as follows, TREAT, J., concurring :

The unwearied attention you have given to the testimony, throughout this protracted trial, gives the court such assurance that you thoroughly appreciate the solemn public duty which, as citizens, you have been involuntarily required to discharge, that we feel it to be wholly unnecessary to impress you with the importance, alike to the government and to the defendant, of the issues committed to your decision. We proceed at once, therefore, to lay before you the legal principles applicable to the ultimate question that you are to decide, which is, whether the defendant at the bar of the court is guilty or not guilty of the offence charged against him in the indictment.

In legal investigations precision is necessary, and hence it is essential that you should first understand what is the exact offense which the government charges upon the defendant. It is, in substance, that the defendant entered into a *conspiracy* with certain distillers and internal revenue officers in the city of St. Louis to defraud the government out of the taxes which the law imposes, for the purpose of revenue, upon the production of distilled spirits. A large portion of the internal revenues of the government is derived from this source, and experience has shown, gentlemen, how general are the attempts made to evade this tax and to defeat the equal and full operation of the laws which impose it.

United States v. McKee.

Revenue laws, though absolutely necessary, are often unpopular ; but it is, perhaps, true, that in no other way can so much revenue be derived with so little general pressure from the burden, as from a duty laid on the manufacture of distilled spirits. Taught by the experience of other countries, as well as by our own experience in this regard, the congress of the United States, in order to insure the full collection of this tax, and to prevent fraudulent evasions of it, has found it necessary to provide a complicated system of checks and safe-guards. The circumstances of the present case do not make it necessary to point out in detail these checks or to describe their operations. It is sufficient to say that the law does not trust to the distiller, but appoints its own agents or officers to watch every material step in the production of distilled spirits, from the purchase of the grain to the final payment of the tax. Confidence and power must from necessity be reposed somewhere ; and the law confides in the officers of its own appointment to see that its requirements are not evaded. It also requires regular reports, under oath, from the distiller and rectifier. The checks provided by the law are so complete and perfect that frauds cannot be committed if the revenue officers are faithful and honest. It hence results that any general scheme to defraud the government of this tax, to be successful, must involve a combination, or, in legal language, a *conspiracy* between the distiller and the rectifier on the one hand, and the government store-keeper, gauger and other internal revenue officers on the other.

Such a conspiracy is substantially charged in the indictment, and it is not a disputed fact in the case, upon the concessions of counsel, that such a conspiracy has been proved to exist. The defendant's counsel concede it and have vied with the counsel for the government in portraying to you its magnitude, and in condemning its actors and operations, the only point in dispute in this respect being, whether the defendant was a member of the conspiracy.

United States v. McKee.

As affecting the application of certain legal principles, hereafter to be mentioned, touching the effect to be given, as respects the defendant, to the acts and declarations of those who are admitted and proved to be conspirators, it is pertinent in this place to call your attention, in a general way, to the nature of the conspiracy shown in this case.

According to the testimony, this conspiracy originated in September, 1871, and with a brief interval in the fall of 1872, and the early part of 1873, continued until May, 1875, when the distilleries were seized and afterwards many of the conspirators arrested and indicted. Some of the conspirators have been convicted, and others have pleaded guilty, and the property of some of the distillers and rectifiers has since been condemned as forfeited to the United States. A shameful feature in the conspiracy is that it seems to have originated not with the distillers and rectifiers but with the revenue agents of the government. Mr. Megrue testifies that he came here in September, 1871, at the instance of John A. Joyce, a revenue agent, to take charge of the illegal organization; that the distillers who first went into it were Bevis & Fraser, Macklot Thompson, and Peter Curran. In 1872 Ulrici, who had first refused to enter it, and who continued to refuse until he saw his business being ruined by his inability to make "straight" compete with "crooked" whiskey, joined the conspiracy. Afterwards other distillers—Teuscher, Busby, and the Bingham Bros.—became members of the illegal organization.

The tax on proof spirits was then 70 cents per gallon, and the agreement was that this tax should, as far as possible, be systematically evaded by removing the spirits from the government warehouse without the payment of the tax, by undermarking the real proof and by the removal and re-use of stamps once used before. One-half of these illicit gains, about 35 cents per gallon, was to be retained by the distiller for his share, and the other 35 cents per gallon was to be re-

ceived and retained by the revenue officers or other conspirators for their share of the unlawful profits.

These collections from the distillers were made with systematic and business like regularity, every Saturday, when the distilleries were in operation. The ring had its collector and its disburser. The first collector was Megrue; he had an office for the transaction of that business; he remained with the organization until the fall of 1872, collecting for himself and for his confederates from the four distilleries named, on an average, as he states, of about \$2,500 per week. Some idea of the magnitude of the fraud may be formed from the fact that Megrue admits that his one-fifth of less than one-half, amounted, in about fourteen months, to the sum of \$50,000 or \$60,000, showing that during that period the government was defrauded at these four distilleries of from \$600,000 to \$800,000. Peter Curran states that he, on his own account, paid to the different collectors of the ring from the first to the last about \$60,000 or \$70,000. From June, 1873, to August, 1874, Fitzroy was the collector for the ring; then Everest, and others. There can be no doubt that from 1871 to 1875 the government was defrauded by this conspiracy in the single city of St. Louis of revenues to the extent of millions of dollars. No honest distiller who paid the tax upon his productions could continue in business in competition with the dishonest who were systematically evading the tax.

It seems astonishing that a conspiracy so enormous in its proportions, and which was depleting the revenue of such vast sums, should so long remain undiscovered by the uncorrupted officers of the government. Some explanation of this is found, however, in the testimony in this case. At different times revenue agents were sent here or visited here; and it is painful to see that the large resources of the conspirators were sufficient to corrupt many of these in their turn. In 1872, Brashear, a revenue agent, visited this place;

United States v. McKee.

\$5,000 were raised by Megrue and paid to him, and that came all from Bevis. In 1873, \$10,000 were raised from the distillers and paid to the same agent with the knowledge and consent of McDonald, the supervisor of internal revenue, and of Joyce, the revenue agent, for a false report as to the condition of the distilleries in this city. In 1874, \$10,000 were raised and paid to Hogue, another revenue agent, for a like purpose.

In the spring of 1875, \$10,000 were raised by the distillers and given to McDonald to be used as a corruption fund in Washington, to stop threatened proceedings. But this was unavailing, and the apprehended seizures and arrests were made. In every instance knowledge of the visits of the government agents and detectives seems in some way to have been discovered by the conspirators, in time to enable the distillers to "straighten up" before the official visitation was made. There is every reason to believe, without going beyond the testimony in this case, that the conspiracy here was not an isolated one, but only a link in a chain of frauds of like character in many states, thus enabling the leading conspirators in different places to co-operate with each other in ways and means to avoid detection and escape punishment.

These considerations serve to explain why it was that the conspiracy here in St. Louis continued so long in existence unknown to the government and the officers who were incorruptible, or high enough in place to strike at it with effect. The extent of this conspiracy and its *continuous* character and operations has an influence in determining the legal principles which we shall hereafter state, as those which belong to this case, and should not be overlooked by the jury in considering the evidence. It is for this purpose that allusion is made to it, and not for the purpose, gentlemen, of exciting your just indignation and shame that such things could be.

United States v. McKee.

Of course, the government on discovering the conspiracy, was bound to lay its strong arm upon it, to arrest and bring the guilty to justice, and this is the work and the duty of courts and juries.

But the government sustains a relation and owes a duty to its *citizens* as well as to its revenues, and its interests do not demand, and will not be promoted by the conviction of any one who is not proved, in the manner required by the rules of law, to be guilty of the offence imputed to him. And so, gentlemen, you must come to a dispassionate consideration of this case, recollecting that the court, and the jury as a part of the court, have but one duty to discharge, but one object to attain, and that is to ascertain the truth, and to do justice with absolute impartiality and fearless independence.

It is well known that the attention of the country has been drawn to these frauds, and the occurrences which have taken place under your eyes during the trial show the warm public interest in these cases.

We feel it to be our duty to say, that while the indignation of every right-minded citizen is justly excited against the real perpetrators of these frauds, the jury should be especially on their guard that this should not over-master, or in any way, or in the least degree, influence their judgment, in deciding the only issue before them, and that is whether the defendant was, and is fully proved to have been, a member of the conspiracy. But in proportion to the extent of the indignation, may be the danger, if the jury are not sedulously on their guard, of including in the list of the guilty, persons named in connection with these frauds, but whose connection remains to be established in the manner and to the extent required by the law in all criminal cases.

It is just as much the duty of the jury to acquit the innocent, as to convict those proved to be guilty.

The existence of a conspiracy in St. Louis being admitted

United States v. McKee.

by defendant's counsel, this narrows your enquiry to a single question of fact, and that is, was the defendant one of the conspirators ?

Megrue, McDonald, Joyce, Fitzroy, Thorpe, Engelke, Barton, Concannon, Finlay Robb, Leavenworth, Bevis & Fraser, Curran, Ulrici, and others here not named, are admitted to have been in the conspiracy ; the question recurs whether the defendant was a member of this conspiracy ? The government affirms it, and must prove it by legal evidence, in order to ask a verdict in its favor. The case of the defendant is peculiar. He was not engaged in the manufacture of distilled spirits. He was not in any manner connected with the revenue service as an officer or agent. The theory of the government is that he was sought out by the originators of the conspiracy by reason of his controlling power in a newspaper of extensive circulation and influence, and his ability to assist, and if need be, to protect the conspirators in case of trouble.

The government seeks to connect the defendant with the conspiracy by reason of his alleged receipt from week to week of a share of the illicit gains of the conspirators ; no other motive is shown for his alleged membership in the conspiracy, and it is quite impossible to suppose he was a member unless he was such for the purpose of pecuniary gain. Accordingly the government has assumed the burden of showing the defendant's connection with the conspiracy by undertaking to prove that he did receive a share of the stolen tax, and really the material question upon the evidence is whether the government has shown this to the satisfaction of the jury, with the degree of positiveness required in criminal cases.

Megrue testified that when he received each Saturday from the distillers his half of the illicit gains for the week, that after setting apart a certain portion for the store-keeper, for the deputy collector, and for the assessor, and some for

United States v. McKee.

the others, the rest of the money was divided each week into five equal parts, one-fifth for McDonald, one-fifth for Joyce, one-fifth for the witness Megrue, and two-fifths, by direction of Joyce, he put into a package or packages, and delivered to John Leavenworth, a gauger (since deceased), each week, with directions to deliver to Ford, the collector, and to McKee.

Megrue says this was done invariably while he was the ring collector, from September, 1871, to the fall of 1872.

Whether Leavenworth ever delivered the packages to Ford or to McKee, the witness Megrue has no personal knowledge, and does not testify.

Fitzroy testifies that when he became collector for the ring he set apart each week a portion for McKee and Ford, until the death of the latter, when the division was in four equal parts instead of five. Bevis, one of the fraudulent distillers, testified that when he paid money to Megrue, he understood from him that it was to go to Joyce, McDonald, McKee and Ford, but he does not know of his own knowledge how it was distributed, or whether any of it came to the hands of McKee and Ford. The other distillers gave no testimony on the point for whom they paid the money or whether it was delivered or not.

Leavenworth reported to Megrue, as the latter swears, when subsequently receiving packages, that he had distributed or delivered to McKee and Ford the packages previously received for them.

But, as we instructed you on the trial, and now repeat, such declarations, that is, the declarations of Leavenworth to Megrue, when he went back for money, from week to week, such declarations, while they are competent evidence to show the relations of Megrue and Leavenworth to each other, and to the transaction, and to explain the act of receiving money from week to week, they are not competent to establish the fact that the defendant, McKee, did receive

United States v. McKee.

the money, but such fact (which, under the circumstances of this case, is equivalent to connecting him with the conspiracy) must be shown by evidence other than the mere declarations and statements of a confessed conspirator, not made to or in the presence of the defendant.

This is a rule of universal application, and the law on this subject may be here appropriately stated. When a conspiracy is shown to exist, the rule of law is that all acts done in furtherance of the conspiracy by any of the conspirators, though not in the presence of the others, and all declarations made by any of the conspirators to advance the common cause, or in connection with acts done in promotion of the conspiracy, though not made in the presence of the other conspirators, are evidence against all the conspirators. One conspirator in such cases is bound by all the acts and declarations of his fellow conspirators done and made to promote the common object; but mere declarations, that is, statements of real conspirators, that some one else is a member of the conspiracy, is not evidence to establish that fact; it must be established by independent evidence of the acts, conduct or admissions of the person himself, who is sought to be implicated; but if it is, by such other independent evidence, once established to the satisfaction of the jury that a person is a member of a conspiracy, then the rule above stated applies, and he is bound by the acts and declarations of his co-conspirators, done and made in furtherance of the illegal scheme, though not done or made in his presence. This distinction is plain enough, and when once clearly apprehended by the jury, not difficult of application. I think, gentlemen, that after what I said to you on the trial, and what I have said now, you appreciate that distinction. It is important to bear that in mind, and I hope I have made it perfectly clear.

To establish the defendant's connection with the conspiracy the government relies chiefly upon the testimony of the

United States v. McKee.

following witnesses: First, Megrue, as to an alleged interview with McKee in 1875, at the Lindell hotel, the circumstances of which need not be here stated, as they have been fully rehearsed by the counsel on both sides, and are doubtless fresh in your minds. That an interview of some character took place at the Lindell hotel does not seem to be denied; but the circumstances under which it occurred and what was said and done are matters in dispute, and for you to determine upon the evidence after settling the credit to be given to the witnesses who speak upon the point. Second, upon the testimony of Fitzroy, particularly that portion of it in which he testifies to the payment of the sum of \$480 to McKee by Joyce and McDonald, in the presence of the witness, in October or November, 1873, and his subsequently making a memorandum of the amount.

This is important testimony, because, if true, in the breadth of the statement of the witness, it tends directly to connect the defendant with the conspiracy. It is claimed by the defendant that this testimony is utterly unworthy of credit by the jury, because Fitzroy is a confessed conspirator, because it is improbable that McKee would have made the remark in the manner imputed to him by the witness, because the witness has been shown by Walsh to have a spite against the defendant, because he is a confessed conspirator, under indictment for alleged perjuries in connection with these frauds, and because of his statements, claimed to be contradictory, in his testimony delivered before you. We shall hereafter speak of the credit due to the evidence of an accomplice, but in this connection will observe generally that really, ultimately, it is solely a question for you to determine, whether, under the circumstances, you can safely place reliance upon such testimony. Reliance is also placed, by the government, to connect the defendant with the conspiracy, upon the testimony of Bernard H. Engelke, one of the conspirators, particularly upon that portion of

United States v. McKee.

his testimony in which he details an interview held, as he says, at the instance of one Hardaway (also one of the conspirators) with McKee, in or about October, 1873. If that conversation occurred substantially as Engelke testifies, it would tend to inculcate the defendant in the conspiracy charged against him.

It is claimed by the defendant that this testimony also is unworthy of credence, not only because Engelke is an accomplice, but especially because he has been contradicted on this point by the evidence of Louis Bohle, and by the evidence of Hardaway, and by an official letter of Maguire's, dated August 20, 1874, in reference to the seizure of spirits in Colorado. On the other hand, the government claims that Engelke is corroborated on this point by Barton, one of the conspirators, and what afterwards took place in connection with the Busby distillery; and that Hardaway is contradicted, to some extent, by the book-keeper of Engelke. That is what the government claims. There is much conflict in the evidence upon this subject. The only thing that seems to be agreed on is that for some reason, for some object, Engelke went once, and but once, to see McKee. When, for what purpose, and what was said then—these are matters of fact for you to decide, bearing in mind that Engelke states that he went to see McKee but once in connection with these matters. Reliance is also placed by the government on the testimony of Sehon D. Thorpe, one of the conspirators, to connect the defendant with the conspiracy.

Without detailing them, it is sufficient to remark that Thorpe testifies to conversations with McKee, and as to arranging an interview between McKee and Megrue, which if true, as Thorpe states them, might imply (that will be for you to decide) on the defendant's part a connection with the conspiracy.

And here, again, the main question is one which exclu-

United States v. McKee.

sively belongs to the jury, viz: The credit to be given to the evidence of Thorpe, who is not only a conspirator under the indictment, but who admitted on the witness stand that he had prevaricated, if not indeed sworn falsely, before the grand jury when he was first before it, and was asked if he knew of any whiskey being removed from the distilleries without the tax being paid on it, and that he replied "No;" whereas, he knew the contrary, at least in the sense of the enquiry, as he knew it was meant to be made. Reliance is also placed by the government to connect the defendant with the conspiracy upon the testimony of Bevis, in which he claims to have had an interview with McKee touching the danger from the removal of the Hardaways from office and also a conversation with McKee during the session of the grand jury, as to the benefit that might enure to those who were or might be indicted if he, the defendant, were not indicted.

Reliance is further placed by the government upon the testimony of Peter Curran touching an alleged interview with McKee, and the exhibition to him of so-called ring checks, wherein he stated that, unless certain revenue suits pending against him were arranged, he would make trouble, and to which, he alleges, McKee replied: "These" (referring to the checks), "are dangerous documents," and left him (Curran) to infer that he would aid him in the said suits as desired.

To connect the defendant with the conspiracy, reliance is placed by the government upon the testimony of Cancannon, a confessed conspirator; particularly in relation to the letter said by Cancannon to have been written by the defendant to Findlay Robb—gauger at Bevis & Fraser's distillery—during the visit of Gen. Sewell, a revenue agent, and to the testimony of the young men Bucher and Bevis, in connection therewith.

Such, gentlemen, is the volume of the testimony on the

United States v. McKee.

part of the United States, except the brief and casual conversation with Merrill, adduced to prove the defendant's guilty participation in the conspiracy. It will be observed that, with the exception of Merrill and young Bucher, the witnesses of the government were all members of the conspiracy. As to the testimony of conspirators, the rule of law is that they are competent witnesses. That means that either party has the right to compel them to be sworn. It also implies that when sworn you shall consider their testimony. They are competent witnesses, and under the legislation of congress they are compelled to testify. The testimony of conspirators is always to be received with extreme caution, and weighed and scrutinized with great care by the jury, who should not convict upon it unsupported, unless it produces in their minds the fullest and most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts in material respects. It is just and proper to do it. It is not absolutely necessary. To establish a conspiracy, or a person's connection therewith, it is competent to do so not only by direct testimony, but by facts and circumstances which produce a clear and positive conviction.

If any of the witnesses are shown knowingly to have testified falsely—knowingly to have testified falsely on this trial or before the grand jury touching matters here involved—this jury are at liberty to reject the whole of their testimony on the trial of this case. To the jury exclusively belongs the duty of weighing the evidence, and ultimately this case comes down to that, gentlemen of the jury. The question for you, under these rules of law, to decide upon this testimony, is peculiarly, exclusively, and emphatically a question for the jury, and the most delicate duty which you have to perform in this case will be to settle the credit to be given, if any, to the testimony of these witnesses. That the law commits to your judgment and conscience.

United States v. McKee.

To the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct, by his manner upon the stand, his relations to the controversy and to the parties—his hopes and his fears, his bias or impartiality, the reasonableness or otherwise of the statements he makes—the strength or weakness of his recollections, viewed in the light of all the other testimony, facts and circumstances in the case.

The defendant has produced an impressive array of witnesses of the highest character, who have testified to his previous uniform and general good reputation as a man of unquestioned integrity. This is competent evidence, and the good character of the defendant in this respect is a fact to be weighed and considered by the jury, in the light of which they should view all the evidence and determine the question of his innocence or guilt of the crime charged against him in the indictment.

The defendant, by the policy of our law, can neither be compelled nor permitted to testify. As a substitute for this deprivation, the burden to establish guilt is upon the government, and the law clothes the defendant with a presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt—*beyond a reasonable doubt*; which means that the evidence of his guilt as charged must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities of guilt; nor, as in civil cases, a preponderance of evidence in favor of the truth of the charges against the defendant; but what the law requires is proof, by legal and credible evidence of such a nature that, when it is all considered by the jury, giving to

 United States v. Babcock.

it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. This, and this only, is required; but this much is required. If the case is thus proved, the jury should convict; but if not, they should acquit.

The sense of duty faithfully and conscientiously discharged goes with us through life, and one of the recollections which never fails to give a deep and tranquil satisfaction, is the recollection of duty thus performed.

Gentlemen, our duty is at an end. Your most important duty here begins. The case is submitted to you.

NOTE.—The jury returned a verdict of guilty, and the defendant was sentenced to pay a fine of \$10,000 and to two years imprisonment.

 UNITED STATES v. ORVILLE E. BABCOCK.

1. Practice of the court in respect to the issue and form of subpoenas *duces tecum* stated.
2. Where the writ is directed to an officer of a telegraph company, to produce certain messages, it need only describe the messages with such practicable certainty that the witness may know what is required of him.
3. The writ, in this case, held to specify the messages with sufficient certainty.
4. It is the duty of the person to whom the writ is directed, to use reasonable diligence to obey it, and to find and produce the required instruments of evidence if they are within his custody.

(Before DILLON and TREAT, JJ.)

Practice in the United States Courts.—Subpoena Duces Tecum.

Mr. Henry Hitchcock presented the following:—

THE UNITED STATES v. ORVILLE E. BABCOCK.

And now comes William Orton, and moves the court to vacate the order granting a subpoena *duces tecum* for him to

United States v. Babcock.

appear in said court, and bring with him the papers and books therein mentioned, for the reason that the order granting such subpoena was improvidently made.

The petition for the order for a subpoena *duces tecum* was as follows : —

UNITED STATES v. ORVILLE E. BABCOCK.—*September term.*

Now comes *David P. Dyer*, attorney of the United States, and petitions for a subpoena *duces tecum* in the above-entitled cause, to be addressed to William Orton, and requiring him to appear as a witness in the above entitled cause, on the 8d day of January, A. D. 1876, and for the United States generally, and to bring with him, respectively, the following described papers and books, to-wit: Copies of all telegrams received through the office of the Western Union Telegraph Company, at Long Branch, in the State of New Jersey, from June 15 to September 15, 1874, and from June 15 to September, 1875, addressed to General O. E. Babcock, signed John McDonald, John A. Joyce, John, or J., with books showing the delivery of the same; all telegrams sent from Long Branch through said office, during said months, signed O. E. Babcock, O. E. B., Bab., or B., addressed to John McDonald, or John A. Joyce, St. Louis, Mo., or Ripon, Wisconsin, all telegrams sent through the office of said company at the city of New York, upon the 9th, 10th, 11th, or 12th days of December, 1874, signed John McDonald, John, Mac, or Mc., addressed to John A. Joyce, St. Louis, Mo., or General O. E. Babcock, Washington, D. C.; also, copies of all telegrams received at the city of New York, from said city of St. Louis, on the 25th, 26th, 27th, 28th, and 29th days of October, 1874, addressed to Mrs. John A. Joyce, Mrs. Kate M. Joyce, Mrs. Kate Joyce, Kate Joyce, or Kate M. Joyce, together with books showing delivery of same. And for cause said attorney

United States v. Babcock.

states that the above cause is pending against said defendant for having, during the period aforesaid, conspired with certain parties to defraud the United States, and said books and papers are material and necessary evidence in said cause, and are now in possession, as said attorney has good reason to believe, of William Orton.

DAVID P. DYER,
United States Attorney for Eastern District of Missouri.

Mr. Hitchcock and Mr. Shepley, for the motion.

D. P. Dyer and James O. Broadhead, contra.

DILLON, *Circuit Judge* (with the concurrence of TREAT, J.), in delivering, orally, the opinion of the court, in substance said : —

We are now preparing to decide the motion presented this morning on behalf of Mr. Orton, the president of the Western Union telegraph company, to vacate the order for a writ of subpoena *duces tecum* which has been served upon him.

A petition was presented, in due form, some days ago, for an order for the issuing of subpoena *duces tecum*, to be directed to William Orton, who is the president of the Western Union telegraph company, to appear as a witness, generally, in the case against Orville E. Babcock, on behalf of the United States, and particularly to bring with him respectively the following described papers, books and telegrams. [Judge DILLON here read the list of telegrams described in the petition for the subpoena, and grounds set up therein.] This petition is to be taken as having the same effect as if it were made in an ordinary case under oath—the official statement, by the district attorney, of the facts therein alleged. The petition was presented, and an order made for the writ to issue. The writ conforms to the peti-

United States v. Babcock.

tion. Mr. Orton, as president of the Western Union telegraph company, appears in court by his counsel, and makes a motion to set aside the writ, on the ground that it was improvidently issued, and counsel have been heard in support of that motion. The question is, whether the writ was properly ordered to be issued.

Several objections are made to the writ. No objection is made on the ground that these messages are privileged, confidential communications; that is, the telegraph company does not insist that they stand in any different relation from what private persons would if they had custody of the same papers. Therefore, we need not consider whether there is any ground to suppose that, in law, the telegraph company occupies a different relation than would be occupied by private persons having custody of the same papers. But *Mr. Shepley* suggested, in argument, that there was no sufficient showing here that these papers were material, but we understood him, finally, not to insist on that point. It is to be observed that the district attorney does state that these papers are material evidence in the case, but, whether they are material or not, is a question which cannot be determined in advance—that depends upon the actual posture and situation of the case when they come to be offered; and when the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed, and that they are material.

The only other objection made was that the petition and writ do not sufficiently identify the messages, or show them to be in the possession of the company, and that the writ, in fact, requires the company to make *search* for these messages. We think that the objection is not made with a proper view of the statements of petition in that regard, and of the functions of the writ. It is very easy, if Mr. Orton or the company is not in possession of the papers, for them to come here and say, "We have no such papers." That excuses

United States v. Babcock.

them to the court, if the court is satisfied that such is the fact. But some degree of certainty is undoubtedly required in undertaking to specify the papers, and we have looked through books which have been referred to by counsel and others, and we find the law and practice quite well settled. It is this : The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used, if the court shall then determine that they are competent and relevant evidence. There is no specific statute of the United States upon the subject. The fifteenth section of the judiciary act refers alone to civil cases at common law, and provides that the courts of the United States may compel *parties* to produce papers and documents pertinent to the issue on trial, under circumstances such as a court of equity can compel the production of like papers and documents. The practice in equity is very well settled. Of course, when a party wants the production of a paper, document, or book, he must specify it with as much particularity as is practicable ; he must state what it is ; he must make a *prima facie* showing that it is in the possession of the other party, and that it is material. But this statute has no reference to this case ; it was enacted to enable a court of common law to obtain books and papers from the *parties*. A court of equity has the power to compel the discovery and production of papers in virtue of its inherent and general jurisdiction. Here are dispatches which are alleged to be in the possession of the telegraph company, which is no party to the suit, and to be material in order to inquire into the legal rights of the parties, and the writ would be just as available for the defendant, as for the United States, if he required the messages. The writ describes, with sufficient particularity, indeed, with all the particularity that seemed to be

United States v. Babcock.

practicable, under the circumstances, the very messages that are wanted. *Vasse v. Miffin*, 4 Wash. C. C. 519.

It is objected that the writ, as framed, in effect, though not in terms, commands Mr. Orton to make *search* for messages. It is the duty of a person to whom such writ is directed, to make reasonable search for the papers and documents required, if they are in his possession. And Mr. Chitty recommends the insertion of a clause in the writ commanding the witness to *search* for the papers or documents he is required to produce; not, indeed, because this is necessary, but as a means of calling the attention of the witness to the duty of *using* reasonable diligence to obey the writ, and the more effectually to secure the production, at the trial, of the required instruments of evidence. 3 Chitty Practice, 829. The views above stated are fully supported by the authorities. *Amey v. Long*, 1 Campb. 14; S. C. 9 East, 478; 3 Starkie Ev. 1722.

MOTION DENIED.

UNITED STATES v. ORVILLE E. BABCOCK.

1. The deposit of a letter in the post-office, postage prepaid, directed to a person at his usual place of residence, is evidence tending to show, and from which a jury may infer, that it reached its destination, and was received by the person to whom it was addressed, if there is nothing in evidence to rebut such inference.
2. Same general principle applied to telegraphic dispatches.

(*Before* DILLON and TREAT, JJ.)

Evidence.—Letters Deposited in Post-Office.—Presumption as to Receipt by Person to Whom Addressed.—Telegraphic Dispatches as Evidence.

ON the trial, one Everest, a witness on the part of the government, and a confessed conspirator, testified that he

United States v. Babcock.

had procured, at the instance of Joyce, from the United States sub-treasury in St. Louis, two \$500 bills; that Joyce received them, and the witness gave evidence from which it might be inferred that each of these bills was placed in a different envelope, and that after they were so placed and directed, postage paid, the witness deposited them (Joyce watching him from the window), in one of the street post-office mail-boxes.

The witness was then asked the question "Whether he observed and could state the address upon the envelopes so deposited?" This question was objected to by the defendant, and was argued by *Mr. Storrs* and *Mr. Porter*, for the defendant, and by *Mr. Dyer* and *Mr. Broadhead*, for the government.

DILLON, *Circuit Judge* (TREAT, J., concurring), said: We are prepared to dispose of the questions raised on the objections to the reception of certain evidence this morning. Mr. Everest, the witness on the stand, gives testimony tending to show that a \$500 bill—we will not say that it shows it was actually in the envelope, but evidence tending to show that a \$500 bill was placed in an envelope, that the envelope was sealed, and that he deposited it, postage prepaid, in one of the United States post-office mail-boxes, and thereupon the question is put by the counsel for the government: "Did you observe the address or direction of the letter which you say you deposited in the letter-box?" and, to that, objection is made by the counsel for the defendant.

The objection rests, as we understand, upon three grounds. One is, that the evidence is inadmissible because it does not tend to show the fact, or establish the fact, that the letter was ever actually received. The second is, that, even if it is evidence tending to show that, still, in the circumstances of the case, as it actually stands, being all the evidence so

United States v. Babcock.

far during the progress of the trial that has been introduced for the purpose of inculcating the defendant, it has no probative force. The third objection, as we understand it, is, that the original of the envelope ought to be produced; and the witness cannot be allowed to testify how it was addressed.

We have looked at the authorities as fully as the limited time at our disposal since the recess would allow. Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice BIGELOW, in *Comm. v. Jeffries*, 7 Allen, 563, that this "is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed." This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. "A fact" (says AGNEW, J., *Tanner v. Hughes*, 33 Pa. St., 290), "in connection with other circumstances, to be referred to the jury," under appropriate instructions, as its value will depend upon all the circumstances of the particular case. It is objected, also, that the evidence, even if admissible, as tending to prove the receipt of the money, should be rejected as immaterial or irrelevant, as having no probative force. If it was admitted here by the counsel for the government, that this was all the evidence which they expected to produce for the purpose of connecting the defendant with the alleged conspiracy, its inconclusive character standing alone, in a case where the defendant's mouth is sealed, would doubtless be such as that the court would be bound to say to the jury that it could not be safely made the basis of a conclusion inculcating the defendant.

United States v. Babcock.

It may not have been actually received; the writer may not have been known; his purpose may not have been known, or the person who received it may not have known why it was sent, or may not have invited it, or have known that it was in any way connected with the guilty purpose ascribed to it by the prosecution, or any illegal purpose or plan; and, as men act differently under the same circumstances, it is for the jury, under proper instructions from the court, to look at the letter, if it was sent and received, in connection with all the other circumstances in evidence.

In relation to the third point, no authorities have been adduced to show that it would be necessary to produce the actual envelope before a witness could testify as to how it was superscribed. It strikes us that the rule does not extend so far. For these purposes, and these purposes only, and with these qualifications, we think the testimony is admissible.

EVIDENCE ADMITTED.

NOTE.—Upon the announcement of the foregoing opinion, the witness took the stand and testified as follows:—

“Colonel *Dyer* (to the witness).—You stated, Mr. Everest, that Colonel Joyce, on the occasion referred to by you, handed to you two sealed envelopes, containing two \$500 bills?”

“Mr. *Storrs*.—I object to the question; I object to the statement of the question by the counsel.

“Judge *DILLON*.—Let the witness restate what he said in that regard.

“Colonel *Dyer*.—Restate, then, if you please, to the jury, what you said in regard to the two envelopes after you received them from Joyce. A.—When Colonel Joyce handed me those two envelopes, he directed me to put them in the letter-box opposite the office, which I did.

“Q.—Where was Joyce at the time you deposited the letters in the letter-box? A.—He was watching me from the window.

“Q.—At the time you deposited the letters, did you observe him at that time? A.—I saluted him, and he saluted me.

“Q.—You put the letters in? A.—I was facing him when I put them in.

“Q.—After the letters came into your hands, and before they were deposited in the box by you, did you examine and see the name and direction on the envelopes? A.—Yes, sir.

United States v. Babcock.

"Q.—Will you state to the jury how the letters were directed, and to whom they were directed? A.—There was one of them directed to W. O. Avery, Washington, D. C., and one to General O. E. Babcock, Washington, D. C.

"Q.—Anything else on the envelopes? A.—There was a post-mark, and each one of them had 'Personal' on the left-hand corner.

"Q.—State whether there was any written or printed matter on the envelopes other than you have given. A.—None at all.

"Q.—What kind of envelopes were they, Mr. Everest? A.—Just ordinary envelopes.

"Q.—You state that the envelopes were post-marked. What do you mean? A.—They had postage-stamps upon them."

Telegraphic dispatches.—Subsequently the court admitted telegrams in evidence, addressed to the defendant by name, care of the executive mansion, Washington, D. C., on proof that they were received by the telegraph company in Washington, and delivered to the door-keepers at the executive mansion, it being shown that the defendant had an office therein as the private secretary of the president, and that the usage of the door-keepers was to deliver such messages to the persons to whom they were addressed, or place them on their desks. Under such circumstances, telegrams were admitted, without direct proof of their actual delivery to, or actual receipt by, the defendant.

The following is the opinion of the court overruling the objections of the defendant to the introduction of dispatches purporting to be to and from the defendant, and to and from McDonald and Joyce:

DILLON, *Circuit Judge* (TREAT, J., concurring).—Respecting the objections against the admissibility as evidence of certain dispatches, we have united in a conclusion as respects all except two dispatches, respectively dated the 3d and 5th of December. We reserve the questions arising upon these two dispatches, which are somewhat novel and peculiar, for further consideration. All others fall within certain objections, which we proceed to state and decide.

We are of the opinion that the objection to the dispatches which have been offered in evidence, based upon the ground that they are not relevant or material, is not well taken. The jury is the constitutional tribunal to determine controverted questions of facts, under appropriate advice from the court to assist them in the discharge of this duty. If the evidence offered tends, in any degree, to establish the existence of any material fact, it cannot be rejected as irrelevant, but must be received and submitted to the consideration of the jury in connection with all the other facts and circumstances of the case. To reject the dispatches offered, on the ground that they were irrelevant and immaterial, would be a decision by the court that such dispatches had nothing to

United States v. Bahcock.

do with the alleged conspiracy, and would take that question, which is a question of fact, from the jury, whose exclusive province it is to decide questions of fact. We do not deem it expedient, or even proper, to remark upon the several dispatches, or to say anything in the presence of the jury calculated to disclose the views of the court as to the force and effect of the several dispatches offered in evidence. It is not to be inferred that, in admitting the dispatches, the court holds that they do or do not connect the defendant with the alleged conspiracy. That is a question for the jury, under advice and direction from the court, which should properly come in the charge or summing up to the jury.

As to the objection that some of the dispatches addressed to the defendant were unanswered, we are of the opinion that, under the circumstances of the case, this alone does not constitute a sufficient ground to exclude them. Such dispatches are to be viewed in connection with all the circumstances of the case, including the nature of the dispatches themselves, as calling for an answer or otherwise, and the situation and relation of the parties, and the effect to be given to the circumstance, that no answers were returned (if the jury find the dispatches were received by the defendant), is to be determined by the jury upon the whole evidence, under the rules of the law to be given in the charge to the jury, bearing upon the subject.

As to the dispatches between McDonald and Joyce, confessed conspirators, such dispatches are admissible as statements or acts of conspirators among themselves, in furtherance of the conspiracy; but, as to the defendant, they go for naught, unless he is shown, by other evidence, to be connected with the conspiracy charged in the indictment.

Judge DILLON (to District Attorney *Dyer*).—Have you offered all the evidence that you intend to offer respecting the dispatches of December 8d and 5th?

District Attorney *Dyer*.—No, sir.

After the production of other evidence touching the dispatches of December 3d and 5th, the dispatch of December 3d was admitted, and the dispatch of December 5th rejected, because the original dispatch was not produced, nor was it proved to have been in the handwriting of the defendant, or to have been authorized or sent by him, or his direction.

The important dispatches received in evidence are given in the charge of the court. See S. C. *post*.

In admitting the dispatches to and from William O. Avery, the court remarked that "they do not purport on their face, as we read them, to connect the defendant with this matter, and they are admitted, not by reason of any declarative force upon their own face, but only to show the acts and declarations of Mr. Avery—on the assumption that he shall be found by the jury to be connected with the conspiracy—to show his acts and declarations in connection with Joyce and McDonald,

United States v. Babcock.

admitted conspirators. The force of the evidence is not for the court to determine. It may or may not be unfavorable to the defendant, as tending to show that some one else, at the other end of the line, was giving information in connection with these frauds."

UNITED STATES v ORVILLE E. BABCOCK.

1. The testimony being closed, the defendant moved for a peremptory direction to the jury to acquit the defendant. Held, that the motion must be denied; 1st, because there are material facts in the case, depending upon the weight of evidence and the credibility of witnesses which are in dispute; 2d, because the proper inferences to be drawn from the evidence were not certain, necessary or undisputed.
2. Relative functions of the court and jury stated, and the cases in the supreme court of the United States, cited.

(Before DILLON and TREAT, JJ.)

Relative Functions of Court and Jury.

THE testimony in the case being closed, the defendant's counsel moved that the court instruct the jury that, there being no evidence, or no sufficient evidence to convict the defendant, it was their duty to return a verdict of not guilty. This motion was argued by *Mr. Porter* and *Mr. Storrs*, for the defendant, and by *Mr. Dyer* and *Mr. Broadhead*, for the United States, and was submitted to the court, which, after taking a recess for an hour for its consideration, gave thereon the following opinion:

DILLON, *Circuit Judge*; TREAT, J., concurring.—The testimony on both sides being closed, the defendant's counsel moved the court for a peremptory direction to the jury to acquit the defendant. The case which the government seeks to make against the defendant is one which largely, if not wholly, depends upon circumstantial evidence, which

United States v. Babcock.

it claims shows that the defendant had criminal knowledge of the conspiracy to defraud the revenues in St. Louis, and that he participated in that conspiracy. The government has sought to implicate him, mainly by certain telegraphic dispatches, to and from him, and by the testimony of Everest as to the mailing of a letter, under circumstances which the counsel for the government maintain would authorize the jury, not standing alone, but in connection with the other facts in evidence, to infer that it contained a five hundred bill, and that it was sent to and received by the defendant for guilty purposes.

The present motion involves a question as to the relative functions of the court and jury which is of great importance. Undoubtedly the court is the judge of the law in criminal as well as in civil cases, and the jury are bound to then receive and apply the law as expounded by the court in the one class of cases the same as in the other.

A motion of the character of the one here made is well known to the practice in the federal courts. "It is equivalent" says the supreme court of the United States, "to a demurrer to the evidence." "It answers the same purpose, and should be tested by the same rules. A demurrer to the evidence admits, not only the facts therein stated, but also every conclusion which a jury might fairly or reasonably infer therefrom." *Schuchardt v. Allens*, 1 Wallace, 359, 370. In deciding the present motion, it must be assumed that all the evidence in the case is true, and that the witnesses are all credible, for if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses, or upon the proper deduction to be drawn from the evidence—these are questions, not for the court, but for the jury under the direction of the court. Counsel have referred to cases in which some courts may have interfered with the province of the jury in a manner which it might be difficult to recon-

cile with the views above expressed ; and particularly to the cases of the *U. S. v. Anthony*, and the *U. S. v. Fullerton*, 7 Blatchford, 177. We do not think it necessary to pass upon the soundness of the decisions in those cases. The case against Fullerton is too briefly reported to enable us to judge exactly of its circumstances or precisely on what principle it was taken from the jury. But it is on the present occasion unnecessary to go into a review of the cases in the inferior courts, or of cases determined in the state courts, since the principles which must guide us have been settled by the supreme court of the United States, whose judgments have in this court the force of authority.

The doctrine of the supreme court of the United States is well shown in *Hickman v. Jones*, 9 Wall. 197. This was a case of malicious prosecution, in which the court peremptorily instructed the jury to acquit two of the defendants. In holding this to have been erroneous, under the circumstances, the supreme court of the United States says : " There was some evidence against most of them ; whether it was sufficient to warrant a verdict of guilty, was a question for the jury under the instruction of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are

United States v. Babcock.

distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact, as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken.”

The supreme court, in cases where the facts are not controverted, and where the inference to be drawn from them is certain, necessary, and undisputed, or where there is no evidence tending to establish a necessary element in the case, has held that the trial court may peremptorily direct what verdict shall be given. *Bevans v. United States*, 18 Wall. 56; *Klein v. Russell*, 19 Wall. 468; *Insurance Co. v. Baring*, 20 Wall. 159. The distinction between cases which fall within the rule first stated, and those which are for the decision of the jury, are well illustrated in the *Railroad Co. v. Stout*, 17 Wall. 657. In this case the supreme court hold that where in any case it is a matter of judgment and discretion, of sound inference, *what* is the deduction to be drawn from even undisputed facts; where different men equally sensible and equally impartial would make different inferences—such cases the law commits to the decision of the jury, under instructions from the court.

The motion here made must, in our judgment, be denied for two reasons; 1st, there are facts which are not undisputed—for example, those relating to the letter testified to by Everest and Magill; 2d, the proper inferences to be drawn from the telegrams and other facts are not so clear and certain, that the court can decide their effect as a matter of law.

United States v. Babcock.

The doctrine contended for by the learned counsel for the defendant, if applied to this case, would require this court to disregard the well-settled rules laid down by the U. S. supreme court in the case of *Hickman v. Jones*, above cited, in which that tribunal holds that the constitutional province of the jury, under instructions from the court, extends to the right to decide upon issues of fact in a weak case as well as in a strong case.

It is not to be inferred by the jury from the overruling of this motion, or from anything we have said, that the court expresses any opinion as to the weight or force of the testimony in the case. The only point we decide is, that it is not our right to take the case as it stands from the jury. At the proper time the court will instruct the jury as to the legal rules, in the light and by the guidance of which they will analyze the evidence before them, and determine the weight to be given to it and the several parts thereof.

MOTION DENIED.

UNITED STATES v. ORVILLE E. BABCOCK.

1. What is necessary in order to constitute a conspiracy; essential to prove some one of the overt acts as charged. Guilty *knowledge* and participation necessary, but same may be proved by circumstantial evidence.
2. Necessity of showing motive, where the evidence is circumstantial.
3. The testimony of Everest and Magill, as to the mailing, at the instance of Joyce, of an envelope to the defendant containing a \$500 bill, and the subsequent withdrawing of it from the letter-box, and the returning of it to Joyce, analyzed, and its effect stated.
4. The dispatches, correspondence, and testimony of the President, with regard to the appointment of a successor to Collector Ford, grouped for the convenience of the jury, and the questions arising thereon stated.

United States v. Babcock.

5. The dispatches and correspondence which took place at the time of Joyce's trip to California, grouped, and the respective theories of the prosecution and defence with reference thereto, stated.
6. The dispatches and testimony relating to the contemplated visit of inspection by Brooks and Hogue to the St. Louis distilleries; and also those in regard to the projected transfer of revenue officers, grouped for the convenience of the jury.
7. After the indictment of McDonald, one of the conspirators, letters were sent to him by the defendant through Major Grimes. Neither the prosecution nor the defendant produced the letters, or proved their contents. *Held*, that the jury were not at liberty to conjecture what their contents were, but were to receive the fact as a circumstance that the defendant and this conspirator were in correspondence with each other about some matter undisclosed, and might consider the time when the correspondence took place, and the manner in which it occurred.
8. The acts and declarations of conspirators are not, of themselves, evidence to connect a third person with the conspiracy; but, if such third person is shown to have been a member of the conspiracy, then telegraphic dispatches of fellow conspirators, among themselves or to others, sent for the purpose of promoting the objects of the conspiracy, become evidence against him.
9. The credit to be given to the testimony of the accomplices stated.
10. Some rules laid down for the guidance of the jury in determining the credibility of witnesses.
11. The effect to be given to evidence of good character of the defendant stated.
12. In cases where the evidence tending to show guilt is wholly circumstantial, the following rules are laid down: 1. The hypothesis of delinquency or guilt of the offence charged in the indictment should flow naturally from the facts proved, and be consistent with them all. 2. The evidence must be such as to exclude every reasonable hypothesis but that of his guilt of the offence imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt *only*, but they must be inconsistent with his innocence. [*People v. Bennett*, 49 N. Y. 144.] If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the former. The burden of proof does not shift in criminal cases; it is on the prosecution throughout to establish the defendant's guilt by the evidence, and, in criminal cases, the defendant, not being permitted to testify, cannot be called upon to explain or produce any proof, until the prosecution, by the evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt.

United States v. Babcock.

13. The law clothes a person accused of crime with a presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt—*beyond a reasonable doubt*—which means that the evidence of his guilt, as charged, must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities, of guilt, nor, as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but, what the law requires, is proof, by legal and credible evidence, of such a nature that, when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt.

(Before DILLON and TREAT, JJ.)

Conspiracy.—Circumstantial Evidence.—Declarations of Conspirators.—Testimony of Accomplices.

DILLON, *Circuit Judge*, charged the jury as follows:—

Gentlemen of the Jury: In preparing what I have to say to you, I am happy in having had the assistance of my brother TREAT, and his concurrence in all the statements and propositions which follow.

Gentlemen, if it is a source of gratification to the court and counsel that their respective labors in this case are drawing to a close, it must be doubly so to you, since, for more than two weeks, you have been restrained of your liberty, deprived of the society of family and friends, cut off from intercourse with the world, and not allowed to converse, even among yourselves, on that subject which has filled the minds of everybody else. The court would willingly have relieved you of this constraint, but the great public interest the case has excited, and the pronounced course of many public journals respecting it—some prejudging it on the one side, and some on the other—and the many imperfect reports of the trial which have met our observation, made it not only proper, but necessary, in the

United States v. Babcock.

interest of justice, that you should be removed beyond the reach of any popular feeling, however strong or subtle, whether favorable to the government or to the defendant; beyond the influence of the press, one of whose plainest public duties it is to abstain, pending a trial, from a course calculated to interfere with the due administration of justice; in a word, beyond any influence whatever, except that to which the solemn oath you have taken confines you, namely, "the law and the evidence given you *in court*."

The constitutional guaranty of a trial by jury, upon legal evidence, under the supervision of the court, is designed to protect the innocent and punish the guilty, and this wise provision will be practically subverted if it be not sedulously guarded from all improper influences; and this is especially necessary in cases which, for any reason, are attended with great public interest or feeling.

Gentlemen, it is justly due to the cheerful patience with which you have submitted to this long confinement, not less than to the attentive care you have given, day after day, to the coming in of the vast mass of testimony now before you for your consideration, that we should, before proceeding to give you directions as to the law of the case, thus publicly recognize and commend your course and conduct.

The court has had the benefit of all the suggestions and arguments that could be offered on the one side or the other by the eminent counsel in the case, touching the questions of law arising in it. Thus aided, our duties on the trial were made comparatively easy, and, fortunately, the duty that yet remains to us is plain; for there is no principle of law now belonging to the case which is controverted by counsel, or which has not been long settled by the courts of Great Britain and this country.

Our further duty is simply to state and define these rules of law, and to make such observations as will assist you in properly applying these rules to the case which the testimony presents for your decision.

United States v. Babcock.

The case against the defendant is one which mainly depends upon circumstantial evidence, and it is in such cases that counsel can be of great assistance to the jury in directing their attention to those circumstances which are considered material to their respective theories, and in commenting upon their force and effect. It has been your good fortune, gentlemen, to listen to arguments, both for the government and for the defendant, which have been marked in no common degree with clear statement, great ability, and masterly analysis.

Declaring that you entered the jury-box wholly free from opinion or bias, one way or the other; kept aloof, pending the trial, from any influence that could improperly affect you; aided by the argument of counsel, and by such instructions and advice as the court is able to give, you come to your deliberations with every circumstance which can conduce to the formation of sound conclusions, and the rendition of a true verdict, according to the law and evidence given you on the trial. The two main questions presented for your consideration are:—

1. Was there such a conspiracy as is described in the indictment, and was any one of the overt acts committed, as alleged, in furtherance of said conspiracy?
2. If such conspiracy existed, was the defendant a member of it, or one of the conspirators?

As to the first of these questions, you may, perhaps, have very little difficulty. It is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by *words* or *in writing*, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to

United States v. Babcock.

accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had *originally* conspired.

The charge in the indictment is substantially that a conspiracy was formed to defraud the United States of the tax of seventy cents per proof gallon on distilled spirits to be produced thereafter in the distilleries named in the indictment. It is necessary, in order to prove the conspiracy as charged, to establish also that some one of the overt acts named was committed by the person alleged in the indictment to have been guilty of said overt act, and that he was one of the conspirators, doing the act to promote the unlawful scheme.

Upon the evidence in the case, and the concessions of counsel, you will, probably, have no doubt as to the existence of a conspiracy of enormous proportions, between the distillers on the one hand and certain internal revenue officers on the other, formed and maintained in the city of St. Louis, whereby the government was systematically plundered for a long period of time, of revenue to a vast amount. It was the duty of the government, on discovering this conspiracy, to crush it—to stamp it out of existence—and to bring the guilty to justice and deserved punishment. But the government sustains a relation and owes a duty to

United States v. Babcock.

its citizens, as well as to its revenues, and its interests do not demand and will not be promoted by the conviction of any one who is not proved, in the manner required by the rules of law, to be guilty of the offence imputed to him ; and so, gentlemen, you must come to a dispassionate consideration of this case, recollecting that the court, and the jury, as a part of the court, have but one duty to discharge, but one object to attain, and that is to ascertain the truth, and to do justice with absolute impartiality and fearless independence.

It is well known that the attention of the country has been drawn to these frauds, and the occurrences which have taken place under your observation show the warm public interest in these trials. We feel it to be our duty to say that, while the indignation of every right-minded citizen is justly excited against the real perpetrators of these frauds, the jury should be especially on their guard that this should not overmaster, or in any way, or in the least degree, influence their judgment in deciding the great issue before them, and that is, whether the defendant was and is fully proved to have been a member of the conspiracy. But, in proportion to the extent of the indignation, there may be the danger, if the jury are not sedulously on their guard, of including in the list of the guilty, persons named in connection with these frauds, but whose connection remains to be established in the manner and to the extent required by the law in all criminal cases. It is just as much the duty of the jury to acquit the innocent as to convict those proved to be guilty.

Assuming that you will find the existence of the conspiracy between Joyce and the distillers and others, your inquiry will be narrowed to a single ultimate question of fact, namely, was the defendant one of the conspirators—a fellow conspirator with Joyce and the distillers named in the indictment? The government affirms it, and must

United States v. Babcock.

prove it by legal and satisfactory evidence, in order to ask a verdict in its favor. As the defendant is indicted for conspiracy with Joyce and the distillers named in the indictment, it is clear that the charge implies that the defendant *knew* there was such a conspiracy in the city of St. Louis, and, with such knowledge, knowingly aided the conspirators in their unlawful scheme; and this guilty knowledge and participation must be proved by the government. No witness has been introduced who has testified that the defendant was ever informed or knew of the conspiracy, or that he ever admitted his knowledge of it, or participation in it. No writing signed by the defendant has been produced which, in direct or express terms, shows such guilty knowledge and participation on his part. But the law does not require direct proof of these facts, but they may be proved by facts and circumstances which show them beyond a reasonable doubt. Accordingly, the prosecution relies upon certain facts and circumstances which it claims to have established by evidence, which it furthermore claims not only justifies, but makes clear and positive the conclusion to be drawn therefrom, viz., that the defendant knew of the conspiracy, and knowingly aided the conspirators.

The case of the defendant is peculiar. He was not a distiller or rectifier. He was not in the internal revenue service as an officer or agent. The theory of the government is that he was sought out by Joyce and McDonald, leading conspirators, because of his residence in Washington, where the internal revenue bureau is located, and his supposed facilities to give information which would prevent the detection and discovery of the frauds, and otherwise render services in aid of the conspiracy. This, it is claimed, is their motive, and no motive is ascribed by the counsel for the government as the inducement to the defendant to enter into the conspiracy, except for purpose of

United States v. Babcock.

pecuniary gain to himself. In all cases, and especially in cases depending on circumstantial evidence, an inquiry into the motives actuating the accused is always important, because human experience shows that men do not commit crime without motive therefor. To show the defendant's motive to be that of pecuniary gain, and to establish his knowledge of, and guilty participation in, the conspiracy, the prosecution relies mainly upon the testimony of Everest as to the mailing of an envelope, by Joyce, with \$500 inclosed therein, to the defendant, and upon certain telegraphic messages to and from the defendant, in connection with the cotemporaneous circumstances, and in connection with other dispatches sent to and from other alleged or confessed conspirators.

As different rules of law apply to these different classes of evidence, it is necessary to advert to them separately. You have heard the testimony of Everest and Magill, with respect to the alleged deposit of two letters in a street letter-box, and the removal of the same from the box by Magill at the instance of Joyce. If you believe both Magill and Everest, then the alleged transaction is so far satisfactorily explained as to show that the defendant did not receive the alleged envelope addressed to him. If you discredit the testimony of Magill you should then bear in mind what Everest described as the details of Joyce's manipulation with respect to the \$500 bills, and as to the deposit of the same, under the eyes of Joyce, in the letter-box, so as to ascertain satisfactorily to yourselves whether both or either of those bills was placed within the envelopes; also, the fact that Everest is a confessed conspirator, and was, at the time, the collector for the ring, and that, as Bevis testifies, the distillers were then making very little illicit spirits, because they knew their distilleries were being watched. These facts may be important, so far as they show the acts and purposes of Joyce in that transaction, and what he really did

United States v. Babcock.

and designed to have Everest understand he was doing. As will be hereafter more fully stated, the testimony of accomplices is to be received with extreme caution, and reliance upon it is always held to be dangerous if unsupported. Hence, it is just and proper that the jury should look outside of conspirators' testimony for corroboration. The evidence of Alexander, that Everest obtained two \$500 bills, is corroborative of that fact, but not of Everest's testimony as to what was done with them by him and Joyce. Should the jury reach the conclusion, however, that Everest did place in the street letter-box an envelope addressed to the defendant, as alleged, and that said letter contained a \$500 bill, and that it was not afterwards removed by Magill, still it is not a conclusive presumption of law, nor a legal presumption, that the defendant *actually* received it, but it is a fact to be considered by the jury in connection with the routine and usages of the postal service, and with other facts and circumstances, to enable them to determine satisfactorily to themselves whether the defendant did receive that letter and its contents, and whether the same was sent and received for a guilty purpose in connection with, and in furtherance of the conspiracy, and that the defendant knew from whom it came, and that it was sent for such guilty purpose, or in connection with the conspiracy named in the indictment. Under the circumstances in the case, it becomes one of your most important and delicate duties to determine the credit to be given to the testimony of the accomplice, Everest. He is the only witness who testifies to any fact tending to show the payment of money to the defendant by any of the conspirators. If you credit Magill, the testimony of Everest as to the money becomes unimportant against the defendant, and then important in his favor, as tending to show a design and purpose on the part of Joyce, in promotion of his own schemes, falsely to hold out to the conspirators here that the defendant was a member of the con-

spiracy ; but, if you do not credit the testimony of Magill, then you will have to determine what reliance, if any, taking all the circumstances together, you can safely place on the testimony of Everest, and what it really proves against the defendant, and what inferences of guilt you can safely draw therefrom. These are matters which the law commits to your sound judgment.

Drawing your conclusions on this subject, it will occur to you as obviously just to bear in mind that, according to Everest's evidence, no one but Joyce and himself knew of the transaction ; that the defendant's mouth is sealed, so that he cannot testify as to whether he did or did not receive the envelope with the inclosure, so that if the evidence is false, or if the alleged inclosure was never sent or never received by him, he is helpless to prove the negative. These are considerations to be weighed by you in forming a judgment as to whether it has been clearly and satisfactorily established to your minds that the defendant did receive the alleged \$500 bill, and for the guilty purpose imputed by the prosecution. As to the credibility of Magill, that is a question wholly for you to determine, guided by the general rule on that subject hereinafter laid down, viz., as to the reasonableness of his statements, his relation to the case, and his manner and conduct on the witness stand, there being no testimony offered to impeach him.

It will thus be understood that on this branch of the case there are four questions for your careful consideration, viz :

1. What credit is due to the testimony of Everest ?
2. If he is to be credited, what does his testimony show as to the use made of the \$500 bills by Joyce in connection with the envelopes ?
3. Whether any such bill was received by the defendant with the guilty knowledge imputed ?
4. What credit is to be given to the testimony of Magill ?

We now pass to another branch of the testimony.

United States v. Babcock.

Evidence has been given tending to show that the conspiracy in St. Louis, between the distillers and rectifiers and internal revenue officers was in full existence and flagrant, when Mr. Ford, collector of internal revenue, died, October 23, 1873.

The first evidence in point of time relied on by the government to connect or tending to connect the defendant with this conspiracy, is that which relates to the appointment of Mr. Ford's successor. It is claimed by the counsel for the government that the defendant, for guilty purposes and to advance the interests of the conspirators, sought to procure the appointment of Joyce or Maguire to that position. On the other hand, the counsel for the defendant claimed that the evidence shows that the defendant did not interfere with or seek to influence the appointment, and that there is nothing to show any improper agency of the defendant, or from which you can infer any unlawful purpose on the part of the defendant in this respect. To sustain this charge against the defendant, the government relies mainly upon the dispatches of Joyce to the defendant, below given, of date respectively October 25, October 27, and October 28, 1873, and particularly the latter, called the "mum" dispatch. On the other hand, the defendant contends that, when these dispatches are read in connection with contemporary dispatches and letters upon the same subject, and the testimony of the President upon the appointment of Mr. Ford's successor, they fail to support the theory of the government as to the agency of the defendant or the unlawful purpose or motive alleged in respect to supplying that vacancy. This, you will perceive gentlemen, thus becomes a question of fact for you to decide upon the whole testimony in the case relating thereto. The evidence on this point is embraced in the following dispatches and letter of Joyce to the defendant, and the deposition of the President, which we have arranged by days in chronological

United States v. Babcock.

order, commencing October 25, and ending October 29, 1873. It does not appear in evidence whether the death of Ford was communicated to the President previously to October 25, 1873.

FORD-MAGUIRE DISPATCHES.

"ST. LOUIS, October 25, 1873.—Gen. O. E. Babcock, executive mansion, Washington, D. C., care President Grant: Poor Ford is dead. McDonald is with his body. Let the president act cautiously on the successionship.

"JOHN A. JOYCE."

"ST. LOUIS, Mo., October 25, 1873.—To His Excellency U. S. Grant, Washington: Please see our dispatch of this day to Delano, and tell us how we, as securities of our friend C. W. Ford, can protect ourselves from any wrong action of his deputies.

"WM. H. BENTON,

"JOHN M. KRUM,

"WM. McKEE."

This is all that bear date October 25; the next are dated October 27.

"ST. LOUIS, October 27, 1873.—His Excellency U. S. Grant: If you received telegram from us please answer.

"JOHN M. KRUM,

"WM. H. BENTON,

"WM. McKEE."

"WASHINGTON, October 27, 1873.—John A. Joyce, St. Louis, Mo.: See that Ford's bondsmen recommend you.

"B."

(Babcock.)

"ST. LOUIS, October 27, 1873.—To Gen. O. E. Babcock, executive mansion, Washington D. C., care President Grant: The bondsmen prefer the man they have recom-

United States v. Babcock.

mended. An expression of the President to his friends here will secure everything. Let the President do for the best, depending upon McDonald and myself to stand by his action to the last. Answer.

“JOHN A. JOYCE.”

“ST. LOUIS, October 27, 1873.—President U. S. Grant, Washington, D. C.: It would be gratifying to your friends and the republicans of our city, if Constantine Maguire could be appointed collector of revenue of the district. He is on Mr. Ford's bond, has the confidence of Mr. Ford's friends, and is really an honest, straightforward man, as well as capable.

“HENRY T. BLOW.”

“ST. LOUIS, October 27, 1873.—To President U. S. Grant, Washington: As your personal and political friends, we urgently request the appointment of Constantine Maguire as successor to our friend, the late C. W. Ford.

“WM. H. BENTON,

“WM. MCKEE,

“JOHN M. KRUM.”

On this subject the President testified as follows:

Q.—[Handing witness a copy of telegram.] I wish you would state what you know in relation to that? A.—This dispatch seems to be dated “Washington, October 27, 1873.—To Wm. H. Benton, Wm. McKee and John M. Krum: Your request in regard to collectorship will be complied with. (Signed) U. S. Grant.” Those gentlemen were part of the bondsmen of Ford, and they had recommended Constantine Maguire for Ford's place as collector.

Q.—The original of that I believe is in your handwriting? A.—Yes, I wrote that myself. I saw the original this morning.

The above are all the dispatches of October 27. On the next day the following:

United States v. Babcock.

"ST. LOUIS, October 28, 1873.—To the President: We have the honor to recommend Col. Constantine Maguire for collector of internal revenue, first district Missouri.

(Signed.)

"JOHN A. JOYCE,

"C. A. NEWCOMB,

"JNO. McDONALD,

"WM. PATRICK."

"ST. LOUIS, October 28, 1873.—Gen. O. E. Babcock, Washington: See dispatch sent to President; we mean it; mum.

"JOHN A. JOYCE."

Letter of Joyce to the defendant:

"ST. LOUIS, October 29, 1873.—Dear General: I heard from you in due course in regard to the collectorship, and went at once to 'see the bondsmen,' but found they were fixed on the man they had recommended, and not being in a position to induce them to act in my behalf, telegraphed as I have already done.

"Of course the telegrams to parties here revolving in and about the *Globe* office got out among the particular friends, and therefore the newspaper hawks got just enough of the action already had to spread themselves and tell more than anybody else knew. I am sure if the President acts upon the recommendation of the bondsmen, and what has been sent from the officers, the interest of the government will be secure, and the public generally will be satisfied.

"Words are not sufficient to convey to yourself and the President the pride I feel for the confidence thus far displayed in me in connection with the vacancy. I shall endeavor in my future actions to meet the good wishes of the President, and you will please convey to him my most hearty thanks for his kindness and confidence. Now that

United States v. Babcock.

poor Ford is dead and gone I can tell you truly that there are few men on earth that can fill his place.

"I would like to telegraph and write you more confidentially; but as the interest of the government will be fully protected in your hands, I will say nothing further on the collectorship at present.

"The resolutions passed at a public meeting in honor of Ford's memory, I have already engrossed on parchment paper, and will forward to his sister and the President in a few days.

"I am, under all circumstances, your friend, etc.,

(Signed)

JOHN A. JOYCE.

"Gen. O. E. Babcock, Washington, D. C.

"P. S.—Gen. McDonald sends kindest regards."

Ford's Successor.—On the subject of the appointment of a successor of Mr. Ford, the President, whose deposition was taken on behalf of the defendant and read in evidence, testifies as follows :

Q.—State, please, what, if any, applications were made at the time of his decease as to the appointment of his successor. A.—It is impossible for me to remember all the applications that were made for the place. I do recollect, however, that Gen. Babcock brought me a dispatch addressed to him by John A. Joyce, in which the latter practically applied for the position.

Q.—What other, if any, applications were made as to the appointment of a successor? But first let me enquire if you have the dispatch to which you have just made reference?

A.—I do not know.

Q.—Do you know where it is? A.—I do not, but presume it could be found. I think it very likely that it is in possession of Gen. Babcock's counsel or of the district attorney.

Q.—Were there any requests or communications with regard to the appointment of Mr. Ford's successor from

United States v. Babcock.

his sureties? A.—When Gen. Babcock exhibited to me the dispatches from Mr. Joyce, I said to him that as Mr. Ford died away from home, and very suddenly, I would, in the selection of a successor, be to a great extent guided by the recommendation and wishes of his bondsmen. I thought they were at least entitled to be heard respecting the person to be selected, and upon whom would devolve the settlement of the affairs of the office.

Q.—What did you do with reference to the appointment, and to whom, if any one, did you decide to leave the nomination of Mr. Ford's successor? A.—That information is embraced in the answer just given.

Q.—Whom did the bondsmen actually recommend? A.—Constantine Maguire.

Q.—And on their recommendation exclusively he received the appointment? A.—I could not say exclusively, because he was well recommended and was satisfactory to the bondsmen of Mr. Ford.

Q.—Did Gen. Babcock ever, in any way, directly or indirectly, urge, or request, or seek to influence the appointment of Mr. Maguire, or did he ever exchange a word with you upon the subject which indicated that he desired his appointment? A.—I do not think he ever did; nor do I believe that he was aware of the existence of Constantine Maguire prior to his recommendation as the successor of Mr. Ford.

Q.—Did you inform Gen. Babcock that you intended to leave the naming of Mr. Ford's successor to his bondsmen? Did you request him so to notify the parties? A.—The question has, I think, already been answered.

Q.—It embraces perhaps this addition: Did you request him to notify the parties? A.—I do not remember.

On his cross examination, the President, in answer to questions by the counsel for the government, testified on the subject as follows:

United States v. Babcock.

Q.—Do you remember whether John A. Joyce was recommended to you as Ford's successor, by General Babcock?

A.—He was not.

Q.—Was any thing said to you by General Babcock, between the time of the death of Ford and the appointment of Constantine Maguire, touching Joyce's fitness for the place? A.—General Babcock presented me a dispatch that he had received from Joyce, saying that he was an applicant, or making application for it; I do not remember the words of it; the substance of it was that he wanted to be Ford's successor; my reply to him was, that I should be guided largely in selecting the successor of Mr. Ford by the recommendation of his bondsmen; he having died suddenly, unexpectedly, and away from home, I thought they were entitled to be at least consulted as to the successor who should settle up his accounts.

Q.—Did you advise General Babcock to telegraph to Joyce to get the bondsmen of Ford to recommend Joyce for collector? A.—I made the statement, in substance, that I have given in answer to a former question; whether I told him to so telegraph or not, it would be impossible for me to say; that might be regarded as at least authority to so telegraph.

Q.—Did you see any telegram of that character from Babcock to Joyce at that time? A.—I do not remember to have seen any.

Q.—Did Gen. Babcock at that time show you a dispatch from Joyce in these words: "ST. LOUIS, October 28, 1873. —See dispatch to the President. We mean it. 'Mum.' (Signed.) Joyce"? A.—I do not think that my memory goes back to that time; since these prosecutions have commenced I have seen that.

Q.—I am asking you in regard to that time? A. —I do not recall it to memory.

Q.—Did you receive a protest against the appointment of

United States v. Babcock.

Constantine Maguire, signed by James G. Yeatman, Robert Campbell; and others? A.—I do not remember such a letter. If such a one was received, it is, no doubt, on file in the treasury department. Such a protest may have been received.

Q.—Your purpose in leaving the nomination of Mr. Ford's successor to his bondsmen was because they were liable on his bond for the administration of his office, was it not? A.—Yes, sir. Further than that, some of them were men that I knew very well and had great confidence in.

Unless we have overlooked something, this constitutes all the evidence produced on either side upon the subject of the appointment of Mr. Ford's successor. If we have omitted anything which the counsel on either side think material, they have leave to call it to our attention at this time, or the omission may be supplied by the jury. Upon this testimony two questions of fact concerning it arise for the decision of the jury. 1. Whether the defendant did, in point of fact, seek to influence the appointment of Mr. Ford's successor. 2. If so, whether he did this for the unlawful purpose alleged, that is, knowing that there was in existence such a conspiracy as is charged in the indictment, and thus knowing it, sought to exert such influence to aid and promote the illegal purpose of Joyce or the other conspirators in this city.

Joyce's Trip to California.—The next class of dispatches relates to the order for Joyce to visit California, and are as follows:

“WASHINGTON, March 7, 1874.—John A. Joyce, revenue agent, St. Louis, Mo.: I need an agent to make investigations at San Francisco, in place of Sewell, confirmed as supervisor and ordered home. Can you go for me, say for two months?

“J. W. DOUGLASS, Commissioner.”

United States v. Babcock.

"ST. LOUIS, March 8, 1874.—Hon. J. W. Douglass, commissioner internal revenue, Washington, D. C.: Shall be pleased to serve the honorable commissioner at San Francisco, or any other place where my work can benefit the government. Before starting to California would like to consult you and receive instructions.

"JOHN A. JOYCE, Revenue Agent."

"WASHINGTON, March 9, 1874.—John A. Joyce, revenue agent, St. Louis, Mo.: Not necessary to come here. Will write you full instructions care of the supervisor of San Francisco.

"J. W. DOUGLASS, Commissioner."

On the same day, March 9th, the commissioner telegraphed leave to Hogue to go out of his district to follow up cases of fraud, and a night telegram from Washington, not from the defendant, but over the signature of "Mack," was sent to Joyce, at St. Louis, stating that "if sickness of your family prevents your going west, R. A. Hogue may pay you a visit."

Following that telegram were these, viz :

"ST. LOUIS, March 10, 1874.—Hon. J. W. Douglass, commissioner internal revenue, Washington, D. C.: When will my instructions to go to California be here?

"JOHN A. JOYCE, Revenue Agent."

"WASHINGTON, March 10, 1874.—John A. Joyce, revenue agent St. Louis, Mo.: Full instructions will be mailed to San Francisco.

"J. W. DOUGLASS, Commissioner."

"WASHINGTON, March 11, 1874.—H. Brownlee, revenue agent, Newcastle, Ind.: You have permission to follow evidences of fraud out of your district.

"J. W. DOUGLASS, Commissioner."

United States v. Babcock.

"MARCH 11, 1874.—Col. John A. Joyce, revenue agent, St. Louis, Mo.: Did you receive Mack's telegram? Your friends will doubtless make you a visit.

"WM. O. AVERY."

"ST. LOUIS, March 11, 1874.—Col. Wm. O. Avery, internal revenue office, Washington, D. C.: Telegrams received. Start for San Francisco Sunday night. All perfect here.

"JOYCE."

"ST. LOUIS, March 14, 1874.—Gen. O. E. Babcock, executive mansion, Washington, D. C.: Start for San Francisco to-morrow night. Make D. call off his scandal-hounds, that only blacken the memory of F. and friends. Business.

"J."

This was written and sent by Joyce; only one, and that the last of this series, was addressed, to the defendant. To it he wrote this answer by mail:

"WASHINGTON, D. C., March 17, 1874.—Dear Joyce: I received your telegram just before you left. I have seen D., and he assures me that no mention has ever been made of Ford's name in the matter of a brewery, and he says there are no charges against any official out there, that it is against a brewery. I do not know your instructions or trip to San Francisco. I think, though, that it is because D. trusts you to do important work. I hope you will have a pleasant trip, and a successful. Nothing new here. All well. Yours truly etc., etc.

"O. E. BABCOCK.

"To Col. J. A. Joyce, Girard Hotel, San Francisco, California."

In this connection the jury should bear in mind that Douglass testifies that the defendant visited the former to enquire if there were any charges in his (the commissioner's office) against Ford, and that the commissioner said

United States v. Babcock.

there were none; also the relations which Ford bore in his life-time to the President, as especially shown by the latter in his deposition. And also Douglass's testimony to the effect that the defendant did not, in any way, seek to prevent investigation into frauds on the revenue, and also the reasons for sending Joyce to California.

The prosecution claims that the purpose of Joyce in appealing to the defendant under pretense of protecting the memory of Ford, was merely to prevent investigations into frauds in St. Louis during his (Joyce's) absence in California, and that the defendant knew of Joyce's guilty purpose, and sought to aid therein.

On the other hand, the counsel for the defendant insist that the testimony distinctly proves that whatever may have been Joyce's purpose, the defendant merely enquired, as Douglass testifies, whether there were any charges against Ford, and denies explicitly that anything was asked as to proposed investigations in St. Louis district. What defendant did on receiving the dispatch from Joyce, depends largely, if not entirely, on the testimony of Douglass, just referred to. It is not here rehearsed in detail, but if the jury are in doubt as to the statements of Douglass on this point, an official copy of his evidence will be furnished to them.

Joyce's Visit to Washington—Telegrams.—It appears that Joyce proceeded to California pursuant to the orders of the commissioner, and returned by leave in June, 1874, and, at his own request, visited Washington as early as July 1, 1874. While in Washington, the following dispatches passed between him and McDonald:

“WASHINGTON, July 1, 1874.—John McDonald, St. Louis: Things look all right here. Let the machine go.

“JOYCE.”

United States v. Babcock.

“WASHINGTON, July 8, 1874.—John McDonald: Matters are hunkey. Go it lively and watch sharply.

“JOYCE.”

“WASHINGTON, July 17, 1874.—John McDonald, St Louis: Am here on my return. What can I do for our side?

“JOYCE.”

“ST. LOUIS, July 18, 1874.—John A. Joyce, Washington: See Maguire’s letter to the commissioner concerning Busby’s house, sure.

“JOHN McDONALD.”

The Projected Tour of Brooks and Hogue.—The next group of telegrams is supposed to relate to the projected visit of Brooks and Hogue to St. Louis. Rogers, the deputy commissioner, testifies that the plan to send them to St. Louis was formed in August, 1874. You have heard what was done in respect thereto, the frequent postponements that occurred and the reasons given therefor.

In this connection your attention is directed to the following:

“ST. LOUIS, August 5, 1874.—Col. Wm. O. Avery, treasury department, Washington, D. C.: Have friends started west again? Find out—let me know.

“A.”

This telegram was in the handwriting of Joyce, and was a night dispatch.

“CINCINNATI, O., August 6, 1874.—J. W. Douglass, commissioner internal revenue, Washington, D. C.: I have just received important information showing extensive frauds in St. Louis in 1871 and 1872. If one W. A. Woodward applies for special commission to attend to this matter, it is not necessary. I have the same information he has, and more conclusive. Send Brooks and we can bring all out that is in this matter. Answer.

“HOGUE, Revenue Agent.”

United States v. Babcock.

From the evidence as to Hogue's conduct from early in 1874 to the close of the alleged conspiracy, the jury may be able to determine the force and significance of the telegrams just read, as also that from Joyce to Avery, dated August 5, a night dispatch.

“ST. LOUIS, August 26, 1874.—Col. Wm. O. Avery, chief clerk, treasury department, Washington D. C.: Are friends coming west? See H. and give me soundings.”

This is Joyce's handwriting. Whether “H.” referred to Hogue or some other person is not directly shown in evidence.

This was also a night dispatch :

“WASHINGTON, October 17, 1874.—John A. Joyce, St. Louis, Mo.: Your friend is in New York and may come to see you.

“AVERY.”

According to Brooks's testimony, he (Brooks) had been in Washington with reference to the projected visit to St. Louis, and was in New York under orders of the commissioner on October 17, 1874.

“ST. LOUIS, October 18, 1874.—Col. Wm. O. Avery, treasury department, Washington, D. C.: Give me something positive on movements of friend; act surely, prompt.

“A.”

This was a night dispatch from Joyce.

ST. LOUIS, October 25, 1874.—Gen. O. E. Babcock, executive mansion, Washington, D. C.: Have you talked with D.? Are things right? How?

“J.”

This was a night dispatch from Joyce, and was not answered, nor does it appear so far as we can see, from Mr. Douglass's testimony, that it was ever acted on. If our

United States v. Babcock.

memory is at fault in this respect, you will correct the omission.

Pursuant to telegraphic orders from Washington, Hogue was to be in St. Louis November 13. From the testimony it seems that he arrived here on November 12, and remained to the 19th, but did not put his name on the hotel register until the 19th—the day he left.

On November 23, Hogue was ordered to report at Washington in person at once, the telegraphic order having been directed to Xenia, O. On November 26, he telegraphed that he had been detained by sickness in his family, and would report on the 1st of December following. He reached Washington on December 3, and Brooks was summoned on that day to Washington to meet Hogue.

Joyce sent a night dispatch as follows :

“ St. Louis, December 3, 1874.—Gen. O. E. Babcock, executive mansion, Washington, D. C.: Has secretary or commissioner ordered anybody here ?

“ J.”

This was not answered.

As Brooks could not go to Washington on December 3, Hogue went to Philadelphia to meet him, and on December 7, both went to Washington, where Brooks remained until noon of December 8. On November 24, Brooks had written this letter :

“ UNITED STATES SECRET SERVICE, 56 BLEEKER STREET, NEW YORK, November 21, 1874.—To H. C. Rogers, deputy commissioner, Washington, D. C.—My dear sir: I am summoned in the United States court at Philadelphia, on Monday, the 23d. The cases will probably be disposed of on that day, so that I can be at Washington on Tuesday. If possible, please have Mr. Hogue there by that time, and may I ask that any western case you think we can work, shall be put in such a state as we can take charge of it, and

United States v. Babcock.

so make the trip profitable to the department, and satisfactory to ourselves. Very respectfully,

“JAS. J. BROOKS, Special agent.”

On December 7, the same day that Brooks and Hogue arrived at Washington from Philadelphia, McDonald also arrived there. On the 8th he informed Rogers that he knew revenue agents had been ordered to St. Louis, and protested against such action.

Whilst then in Washington, he sent the following telegrams:

“WASHINGTON, D. C., December 7, 1874.—Col. John A. Joyce, Planter's House, St. Louis, Mo.: Had long ride with the President this afternoon. B. and H. are here, you will hear from me to-morrow.

“JOHN.”

“CORRIDOR HOUSE OF REPRESENTATIVES, December 8, 1874.—John A. Joyce, Planter's House, St. Louis, Mo.: Dead dog; goose hangs altitudelum; the sun shines.

“JOHN.”

“DECEMBER 9, 1874.—Col. John A. Joyce, Planter's House, St. Louis, Mo.: I leave to-night for New York—stop at Windsor House; will telegraph you from there.

“JOHN.”

On or about December 10, 1874, the defendant had an interview with Commissioner Douglass, and showed to him a copy of Brooks's letter to Rogers, dated November 21, 1874, the original of which Rogers said had been taken surreptitiously from his desk by some one unknown to him. It is admitted that the defendant did not abstract that letter from Rogers's office; he urged on Douglass that the phraseology of the letter indicated blackmailing purposes, and suggested the employment of a superior class of persons for the intended work; the conversation on that subject as detailed by Mr. Douglass, must be fresh in your memory.

United States v. Babcock.

The President in his deposition, states, concerning that matter, as follows :

Q.—Did Gen. Babcock, so far as you know, ever seek in any way to influence your action with reference to any charges made, or proposed to be made against Joyce or McDonald? A.—I do not remember of his ever speaking to me upon the subject; he took no lively interest in the matter, or I should have recollected it.

Q.—Did Gen. Babcock, so far as you know, ever seek in any way to influence your action in reference to any investigation of the alleged whisky frauds in St. Louis or elsewhere? A.—He did not. I will state at this point, that I do not remember but one instance where he talked with me on the subject of these investigations, excepting since his indictment. It was then simply to say to me that he had asked Mr. Douglass why it was his department treated all their officers as though they were dishonest persons, who required to be watched by spies, and why he could not make inspections similar to those which prevailed in the army, selecting for the purpose men of character who could enter distilleries, examine the books and make reports which could be relied upon as correct. Gen. Babcock simply told me that he had said as much to Mr. Douglass.

Q.—Do you remember the circumstance of John McDonald being in the city of Washington on the 7th day of February, 1874? A.—I do not remember the particular date; I remember the time in question.

Q.—Did you ride with him (McDonald) on or about that date or occasion, and was anything whatever said by him to you with reference to the investigation of alleged frauds in that district? A.—I picked him up on the sidewalk as I was taking a drive, and invited him to go with me; I have no recollection of any word or words on any matter touching his official position or business.

Q.—If I understood correctly the answer, Gen. Babcock's conception was, that in making this investigation it would

United States v. Babcock.

be wiser to have it done by men of superior character than by men of inferior and suspicious character? A.—Yes, sir.

Q.—Did Gen. Babcock, at or about that time, say anything to you with reference to such investigations, and, to your knowledge, did he in any way undertake to prevent them? A.—I have no recollection of his saying anything about that. Certainly he did not intercede with me to prevent them.

On the cross-examination the President said :

Q.—Do you remember that Gen. Babcock, prior to May, 1875, talked with you about the propriety of sending detectives into the several districts to detect frauds? A.—I do. I remember of his telling me at one time of what he had proposed to Mr. Douglass, but the date of it I do not remember. And that was not a suggestion to me; it was merely telling me what he had suggested to M. Douglass, and this is the same that I have before stated.

Q.—Did you have any conversation with Gen. Babcock prior to May, 1875, in reference to a letter written by J. J. Brooks to deputy commissioner Rogers? A.—I do not remember dates, but I remember of his showing me a letter that had been handed to him from somebody in Philadelphia to Mr. Rogers, and he said that that appeared to his judgment to be simply blackmailing; and I think that was the occasion when he told me what he had said to Mr. Douglass, that is, as I remember now.

Q.—Do you remember when that conversation was? A.—No, I do not. My recollection is that he had shown that letter to Mr. Douglass before he did to me, and that was the occasion when he told me of his suggestion.

On December 13, 1874, the defendant and Douglass had a conversation in Washington, while walking, in the course of which Douglass informed the defendant, that the proposed visit of Brooks and Hogue to St. Louis was "off." The following night dispatch was sent by the defendant:

United States v. Babcock.

“WASHINGTON, D. C., December 18, 1874.—Gen. John A. McDonald, St. Louis, Mo.: I succeeded. They will not go. I will write you.

“SYLPH.”

We have thus endeavored to recall the more important portions of the testimony with reference to this branch of the case; your memory will supply the minor details.

The theories, both of the government and of the defendant with respect thereto, have been so fully and elaborately discussed as to require no special comment from the court in this immediate connection.

Transfer of Revenue Officials.—As to the Order Transferring Supervisors and the Suspension of that Order.—Passing to another part of the case, it appears from the testimony of Douglass, Tutton, and the President, that an order was issued about January 27, 1875, transferring supervisors and revenue agents from one district to another, in the supposed interests of the revenue service, and for the detection and prevention of frauds. Mr. Douglass and Mr. Rogers have stated the conversation defendant had with them respectively on the subject, and concerning the impolicy of the order and the reasons assigned to them in support of his views. The prosecution claims that he actively interfered to cause the suspension of that order for the guilty purpose of aiding the conspiracy in St. Louis.

Mr. Douglass testifies that letters for the various transfers were mailed January 27, 1875.

On February 3, the following telegrams were sent and received:

“ST. LOUIS, Mo., February 3, 1875.—Hon. J. W. Douglass, internal revenue office, Washington, D. C.: Don’t like the order. It will damage the government and injure the administration. Will explain when I see you.

“JOHN McDONALD.”

United States v. Babcock.

"WASHINGTON, D. C., February 3, 1875.—John McDonald, supervisor, St. Louis, Mo.: The order of transfer is general and only temporary.

"J. W. DOUGLASS, Commissioner."

"ST. LOUIS, February 3, 1874.—Gen. O. E. Babcock, executive mansion, Washington, D. C.: We have official information that the enemy weakens. Push things.

"SYLPH,"

This was written by Joyce, and was a night dispatch and unanswered.

"WASHINGTON, February 4, 1875.—Gen. John McDonald, supervisor, St. Louis, Mo.: The order transferring you to Philadelphia is suspended until further orders.

"J. W. DOUGLASS, Commissioner."

"WASHINGTON, February 5, 1875.—John A. Joyce, revenue agent, St. Louis, Mo.: The order directing you to report to Supervisor McDonald, at Philadelphia, on the 15th, is suspended.

"J. W. DOUGLASS, Commissioner."

Joyce seems to have been in Washington at that time, and several telegrams subsequently passed between him and McDonald, as follows:

"ST. LOUIS, February 5, 1875.—To Col. John A. Joyce, Ebbitt House, Washington: Order to transfer to Philadelphia is suspended.

"JOHN McDONALD, Supervisor of Internal Revenue."

"WASHINGTON, February 6, 1875.—To Gen. John McDonald, Planter's House, St. Louis, Mo.: Order busted forever. D. & Co. mad. Hold things level.

"KEARNEY."

(This was written by Joyce.)

"WASHINGTON, February 10, 1875.—Gen. John McDon-

United States v. Babcock.

ald, supervisor of internal revenue, St. Louis, Mo.: Start home to-night. Things look lovely. Watch and wait.

“JOHN.”

It is admitted that this was also written by Joyce. These dispatches indicate that Joyce left St. Louis for Washington on the 4th of February, and did not leave Washington for St. Louis before the 10th:

“WASHINGTON, D. C., March 1, 1875.—General John McDonald, Supervisor of Internal Revenue, St. Louis, Mo.: Letter received; have seen the gentleman, and he seems friendly; is looking after improvements of the river.

“O. E. BABCOCK.”

You have heard from Commissioner Douglass, Revenue Agent Tutton, and the President, their respective statements concerning the suspension of the order for the transfer of supervisors and revenue agents. Mr. Tutton stated his interview, first with the commissioner and next with the secretary of the treasury, to whom he presented his reasons for advising a suspension of that order. He stated, as the result of his conversation with the secretary, that the latter acquiesced in the propriety of his suggestions, and requested him to call on the President and present the subject to him. He testified that he did as thus requested, and gave at considerable length what he said to the President in favor of suspending the order. He stated that his interviews with the Secretary and President were on February 3d, and within about two hours of each other; and, before leaving the president, the latter announced that he should at once cause the order to be suspended. The following is the order:—

“EXECUTIVE MANSION, WASHINGTON, February 4, 1875.—
Sir: The President directs me to say that he desires that the circular order transferring supervisors of internal revenue be suspended by telegraph until further orders.

(Signed)

“LEVI P. LUCKEY.”

United States v. Babcock.

The following is what the President testifies to on that point : —

Q.—Do you recollect the circumstances attending the promulgation of an order transferring the various supervisors from their own to other districts. A.—I do.

Q.—State fully with whom the idea upon which that order was based originated, and the particular reasons which induced you to direct it to be so? A.—Some time when Mr. Richardson was secretary, I think, at all events, before Secretary Bristow became the head of the department, Mr. Douglass, in talking with me, expressed the idea that it would be a good plan occasionally to shift the various supervisors from one district to another. I expressed myself favorably toward it, but it was not done then; nor was it thought of any more by me until it became evident that the treasury was being defrauded of a portion of the revenue that it should receive from the distillation of spirits in the west. Secretary Bristow at that time called on me, and made a general statement of his suspicions, when I suggested to him this idea. On that suggestion, the order making these transfers of supervisors was made. At that time I did not understand that there was any suspicion at all of the officials, but that each official had his own way of transacting his business. These distillers, having so much pecuniary interest in deceiving the officials, learn their ways and know how to avoid them. My idea was, that, by putting new supervisors, acquainted with their duties, over them, they would run across and detect their crooked ways. This was the view I had, and explains the reason why I suggested the change.

Q.—Can you state whether Mr. Douglas, at that time commissioner of internal revenue, was aware of the fact that you suggested or made the order? A.—I do not know that he knew anything about it.

Q.—After the order had been finally issued, were any

United States v. Babcock.

efforts made to induce you to order its revocation or suspension? A.—Yes, sir; most strenuous efforts.

Q.—Were such efforts made by prominent public men? A.—They were.

Q.—Did you resist the pressure which was made upon you for revocation or suspension of the order; and if you finally decided to direct the revocation of the order, will you please state why you were induced to do so, and by whom? A.—I resisted all efforts to have the order revoked, until I became convinced that it should be revoked or suspended in the interests of detecting frauds that had already been committed. In the conversation with Supervisor Tutton, he said to me that if the object of that order was to detect frauds that had already been committed, he thought it would not be accomplished. He remarked that this order was to go into effect on the fifteenth of February. This conversation occurred late in January, and he alleged that it would give the distillers who had been defrauding the treasury three weeks notice to get their houses in order, and be prepared to receive the new supervisor. That he himself would probably go into a district where frauds had been committed, and would find everything in good order, and he would be compelled so to report. That the order would probably result in stopping the frauds, at least for a time, but would not lead to the detection of those that had already been committed. He said that if the order was revoked, it would be regarded as a triumph for those who had been defrauding the treasury. It would throw them off their guard, and we could send special agents of the treasury to the suspected distilleries—send good men, such an one as he mentioned, Mr. Brooks. They could go out and would not be known to the distillers, and, before they could be aware of it, the latter's frauds could be detected. The proofs would be all complete, the distilleries could be seized and their owners prosecuted. I was so convinced that his

United States v. Babcock.

argument was sound, and that it was in the interest of the detection and punishment of fraud that this order should be suspended, that I then told him that I would suspend it immediately, and I did so without any further consultation with any one. My recollection is, that I wrote the direction for the suspension of the order on a card, in pencil, certainly before leaving my office that afternoon, and that order was issued and sent to the treasury, signed by one of my secretaries.

Q.—Did General Babcock ever, in any way, directly or indirectly, seek to influence your action in reference to that order? A.—I do not remember his ever speaking to me about it or exhibiting any interest in the matter.

Q.—From anything he ever said or did, do you know whether he desired that the order should be revoked or suspended? A.—That question, I think, has been fully answered.

Q.—You have said that you resisted the pressure brought to bear upon you, by prominent men, in regard to the suspension or revocation of the order transferring supervisors. If you have no objection, will you please state the names of those prominent men who brought that pressure to bear against you? A.—There were many persons, and I think I could give the names of several senators, and probably other members of congress; but probably I should have to refer to papers that are on file; I do not know that it is material; I know that the pressure was continual from the supervisors and their friends.

Q.—Can you, from memory, name any senator or representative? A.—I could name two or three, but I do not believe it is necessary.

Correspondence with Major Grimes, etc.—The prosecution has also offered the testimony of Major Grimes to show that the defendant sent under cover to him (Major Grimes)

United States v. Babcock.

three letters to McDonald, after the latter had been indicted. Neither the prosecution nor the defence has produced these letters or shown their contents.

The jury, in cases of this kind, are not at liberty, under the rules prescribed by law, to conjecture what their contents were, but are to receive that fact as a circumstance indicating that the parties thereto were in correspondence with each other on some subject undisclosed, and to consider the time when said correspondence took place and the manner in which it occurred.

The defendant has produced several letters from Joyce to himself, for the purpose of explaining the nature of their correspondence with each other. He has also shown, by the testimony of the President and of many other witnesses, that the duties of his office made him a kind of intermediary between the President and those having business with the latter or the several departments at Washington. These facts it is for you to consider in reaching a conclusion. They may serve to explain what otherwise might appear obscure, and hence are important in any aspect which you may view the evidence in regard to the respective theories advanced.

Declarations and Dispatches—Legal Rules.—Various classes of dispatches, as you will have perceived, have been laid before you—some to the defendant and some from him; some between confessed conspirators, not referring to the defendant, and unaccompanied by proof that he knew of them; and other dispatches between revenue officers and agents of the government. The dispatches between other persons than the defendant are no evidence to show his connection with the conspiracy, unless they are brought home to him. They were admitted to show the nature and purpose, the plan and operations of the conspiracy.

Guilt cannot be fastened upon any person by the declara-

United States v. Babcock.

tions or statements, oral or written, of others. Guilt must originate within a man's own heart, and it must be established by his own acts, conduct or admissions. Hence, in determining the question of the defendant's guilt, so far as it is sought to be shown by the dispatches, primary reference must be had to the dispatches to and from the defendant, and more especially such dispatches as he is shown to have answered or acted on. If the dispatches to and from the defendant, in connection with the other facts and circumstances in the case, show that he knew of the alleged conspiracy, and that he was a guilty participator therein, then the dispatches of his fellow conspirators among themselves, or to others, sent for the purpose of promoting the conspiracy, become evidence against the defendant, but not otherwise. What weight, if any, is to be given to the dispatches which are not shown to have been acted upon by the defendant, must depend, among other considerations, upon whether an answer was called for or not, and upon his associations with the persons sending the same; what they import on their face, and whether he knew that the senders were engaged in the conspiracy alleged in the indictment. For it must be understood that, under the established rules of the law, the various acts and declarations of persons, other than the defendant, are not evidence to show that he was one of the conspirators—for no man's connection with a conspiracy can be legally established by what others did in his absence and without his knowledge and concurrence.

You will also remember, gentlemen of the jury, that confessed conspirators in St. Louis testified that they were frequently warned of proposed visits of agents of the revenue service to investigate frauds in this district. Hence, one of the essential inquiries in this case is as to the sources of the information thus given.

According to the testimony of Brooks, he and Hogue, af-

United States v. Babcock.

ter a visit to New Orleans, arrived in this city on May 4, 1874, to make an investigation concerning the destruction of books at the establishment of Bevis & Fraser. There had been, in January preceding, an unsatisfactory report on that subject by the local officers here, in respect to which it is alleged that Joyce had visited Washington with fraudulent purposes, indicated by his dispatches, at the time, to McDonald, asking the latter to send his report. The result of the investigation by Brooks and Hogue, when they were here, was the institution of judicial proceedings which culminated in the payment of \$40,000, by Bevis & Fraser, to the government, by way of compromise. Mr. Brooks testified that, while here, he cautioned Hogue against his familiar association with persons in this city, who, though not then considered connected with frauds, are now known to have been actively engaged in them.

The letters of Hogue to Bingham show that, early in 1874, if not previously, he (Hogue) had been corrupted, and was working persistently in aid of the conspirators by conveying the information essential to the success of their fraudulent schemes. Bingham had distilleries in Indiana and one here, and information given him by Hogue was sent to Barton, Bingham's superintendent in St. Louis, and by that superintendent promptly communicated to the other conspirators in this city. It appears that Hogue was in St. Louis from the 12th to the 19th of November of that year, his name being omitted from the hotel register until the day he left. About that time, the conspirators here paid him, as a bribe, the sum of \$10,000, and his letters indicate that he worked for a long period, and, down to the seizure in St. Louis, in the interests of the conspirators.

The telegraphic dispatches to and from Avery, who was, part of the time, chief clerk in the treasury department, and, part of the time, chief clerk in the internal revenue bureau of Washington, are also before you, and also the

United States v. Rabcock.

frequent visits of McDonald and Joyce to that city, at times when arrivals at St. Louis of revenue agents were apprehended.

These significant facts it is for you to weigh, in order to determine whence the needed warnings to the conspirators came. The prosecution contends that the defendant gave from Washington the information needed by the conspirators here, and aided in preventing the visits here which the conspirators were anxious to avoid. The defendant contends, on the other hand, that Hogue furnished the needed warnings, and, perhaps, Avery also; that the defendant did not know of the existence of the conspiracy, and gave knowingly no aid thereto; that, as the conspirators had full sources of information through Avery and Hogue, they had no adequate motive in seeking his assistance as a member of the conspiracy, or in permitting him to know of their fraudulent schemes.

That Brashear and Hogue, two of the revenue agents sent here, were bribed by the conspirators remains uncontradicted. The facilities which Hogue enjoyed for learning the plans of the revenue authorities at Washington for the detection of frauds in the west, Rogers, Brooks, and Douglass show, and how he used these facilities for the benefit of the conspirators, his letters indicate. In the light of such testimony the jury should examine the alleged connection of the defendant with the conspiracy here, and weigh his acts, conduct, and declarations, oral and written. It is not so much from isolated facts and circumstances, as from all of them taken together, and duly weighed, that a right conclusion can be reached. It may often happen that one or many acts, or groups of acts, taken separately, will fail to establish the existence or nature of a general plan, when all of them, considered together in a careful and painstaking way, will show that there was a general and common plan, and disclose the nature and scope thereof.

United States v. Babcock.

We have thus endeavored to recall to your recollection the more prominent features of the evidence, not that any part thereof is to be excluded from your attentive and careful consideration, but, trusting that these references will bring to your memory the minor and other facts and circumstances, which may shed light on the case.

Testimony of Accomplices.—Some of the witnesses on the part of the government, on material and disputed points, are confessed members of the conspiracy, and under indictment therefor. Such a connection with the offence makes them accomplices, and it thus becomes necessary that the court should state to the jury the law touching the testimony of such witnesses. The rule of law is that accomplices are competent witnesses. That means that the parties have a right to have them sworn. It also implies that, when sworn, you shall consider their testimony. They are competent witnesses, and, under the legislation of congress, they may be compelled to testify. The testimony of conspirators is always to be received with extreme caution, and weighed and scrutinized with great care by the jury, who should not rely upon it unsupported, unless it produces in their minds the fullest and most positive conviction of its truth. It is just and proper, in such cases, for the jury to seek for corroborating facts in material respects. It is just and proper to do it. It is not absolutely necessary, provided the testimony of the accomplice produces in the minds of the jury, full and undoubting conviction of its truth.

Credibility of Witnesses.—To the jury exclusively belongs the duty of weighing the evidence, and determining the credibility of witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct; by his manner upon the stand; his relation to the controversy and

United States v. Babcock.

to the parties; his hopes and fears; his bias or impartiality; the reasonableness, or otherwise, of the statements he makes; the strength or weakness of his recollection, viewed in the light of all the other testimony, facts and circumstances in the case. If any of the witnesses are shown knowingly to have testified falsely on this trial, touching matters here involved, the jury are at liberty to reject the whole of their testimony on the trial of this case.

Character of the Defendant.—The defendant has produced an impressive array of witnesses of the highest character who have testified to his previous uniform and general good reputation, as a man of unquestioned integrity. This is competent evidence, and the good character of the defendant in this respect is a fact to be weighed and considered by the jury, in the light of which they should view all the evidence and determine the question of his innocence or guilt of the crime charged against him in the indictment.

The above is the settled rule of the law in all criminal cases, as well in those in which direct and positive evidence is relied on, as those in which the proof is circumstantial. but in cases of the latter kind the evidence of previous good character has more scope and force than in cases where the proof of the offence is positive and direct. In the language of an eminent judge, speaking upon this point: "There may be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive." So that we repeat, the evidence on the subject of character is a fact fit and proper, like all the other facts in the case, to be weighed and estimated by the jury, who, when forming their conclusions upon the various facts and

United States v. Babcock.

circumstances relied on against the defendant, will inquire and determine whether a person whose character is such as the defendant's has been stated to be by the witnesses testifying on that subject has or has not committed the particular crime for which he is called upon to answer. Whart. Crim. Law, 7th edition, secs. 648, 644.

Circumstantial Evidence.—In cases depending upon circumstantial evidence, certain rules of law have long been settled, which it is essential that you should understand and apply. We adopt as a correct exposition of the law on this subject, the opinion of the court of appeals of New York:

“1. The hypothesis of delinquency or guilt (of the offense charged in the indictment) should flow naturally from the facts proved, and be consistent with them all.”

“2. The evidence must be such as to exclude every (reasonable) hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt not *only*, but they must be inconsistent with his innocence.” *People v. Bennett*, 49 N. Y. 144. If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the former. The burden of proof does not shift in criminal cases; it is on the prosecution throughout to establish the defendant's guilt by the evidence, and in criminal cases the defendant, not being permitted to testify, can not be called upon to explain or produce any proof until the prosecution, by the evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt. *Chaffee v. United States*, 18 Wall. 516.

Degree of Proof.—The defendant, by the policy of our law, can neither be compelled nor permitted to testify.

As a substitute for this deprivation, the law clothes the defendant with a presumption of innocence, which attends and protects him until it is overcome by testimony which

United States v. Babcock.

proves his guilt beyond a reasonable doubt—*beyond a reasonable doubt*—which means that the evidence of his guilt, as charged, must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities of guilt, nor, as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but what the law requires is proof, by legal and credible evidence, of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. This, and this only, is required. But this much is required. If thus proved, the jury should convict; if not, they should acquit.

Conclusion.—We trust, gentlemen, that it is unnecessary to remind you that neither partisan feelings nor outside views should have the slightest influence upon your minds as jurors. In every free government it is not only the right, but the duty, of each citizen to form and express, on all suitable occasions, his convictions and opinions as to the governmental policies and party organizations. It is natural and proper for him to join such a party as most nearly accords with his views. But such views and party associations should remain entirely outside of the jury box. No popular or partisan clamors, no extraneous wishes or considerations, no thoughts other than those which pertain to strictly impartial justice, can be permitted to invade the sanctity of the jury-room, to bias or warp, or even shade its deliberations, without destruction of the safeguard to life, liberty and property furnished through trials by jury. It has been often and forcibly said, that so long as trials by jury retain their full force, impartiality and purity, the lib-

United States v. Babcock.

erty, and rights of the citizens, are alike safe against despotism and anarchy. If popular clamor usurp the judgment seat, the era of Marats and Robespierres will return, and frenzied faction sweep away all justice and right. So will justice be gradually undermined if outside influences are suffered insidiously to enter within that threshold where naught should be known save the sworn evidence in the case, and the rules of law as pronounced by the court—rules which the experience and wisdom of ages have demonstrated to be essential to the ascertainment of truth and the due administration of justice.

It will be a sad and shameful day for this country when courts and juries, having lost their independence, shall sit simply to register the edict of popular opinion to acquit this man or convict that one.

Thus we commit this case, with all its issues, to your decision, and may the good Father of us all give you the light to see and the grace to discharge your duty.

NOTE.—The jury returned a verdict of not guilty.

The indictment in the above case was framed upon sec. 5440 of the Revised Statutes, and is as follows:—

THE INDICTMENT.

United States of America, Eastern District of Missouri, ss:

In the district court of the United States, for the eastern district of Missouri. At the November term of said court, A. D. 1875.

The grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire in and for the eastern district of Missouri, on their oaths present that Orville E. Babcock and John A. Joyce, late of said district, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-four, at the said district, did conspire, combine, confederate, and agree together among themselves, and with John McDonald, Joseph M. Fitzroy, Alfred Bevis, Edward B. Fraser, Rudolph W. Ulrici, Louis Teuscher, John Busby, Gordon B. Bingham, and John W. Bingham, with certain other persons, to the grand jurors aforesaid unknown, to defraud the United States of the internal revenue tax of seventy cents, then and there imposed by law

United States v. Babcock.

upon each and every proof gallon of a large quantity, to-wit, one million proof gallons of distilled spirits, thereafter to be produced at certain distilleries, then and there situated in the city of St. Louis, within said district, to-wit, the distillery then and there occupied by the said Alfred Bevis and Edward B. Fraser, and then and there situated at the northeast corner of Barton Street and DeKalb street, in said city of St. Louis, and within said district; the distillery then and there occupied by the said Rudolph W. Ulrici, and then and there situated at the southwest corner of Cedar street and Main street in the said city of St. Louis, and within said district; the distillery then and there occupied by the said Louis Teuscher, and then and there situated at Nos. 2808, 2810, 2812, 2814, and 2816, inclusive, North Second street, in said city of St. Louis, and in said district; the distillery then and there occupied by the said John Busby, and then and there situated at the southwest corner of Cass avenue and Eleventh street, in said city of St. Louis and within said district; the distillery then and there occupied by said Gordon B. Bingham and John W. Bingham, and then and there situated at No. 1313 Papin street, in said city of St. Louis, and within said district.

That afterward, to-wit, on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the eastern district of Missouri, the said Alfred Bevis and Edward B. Fraser, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the northeast corner of Barton street and DeKalb street, in the said city of St. Louis, to a place other than the distillery warehouse situated upon and constituting a part of the distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said Rudolph W. Ulrici, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the southwest corner of Cedar street and Main street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents then and there imposed by law upon each and every proof gallon

United States v. Babcock.

thereof had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said Louis Teuscher, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery, situated as aforesaid at Nos. 2808, 2810, 2812, 2814, and 2816, inclusive, North Second street, in the said city of St. Louis, to a place other than a distillery warehouse, situated upon and constituting a part of the said distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-witt, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said John Busby, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery, situated as aforesaid at the southwest corner of Cass avenue and Eleventh street, in the said city of St. Louis, to a place other than the distillery warehouse situated upon and constituting a part of the said distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said Gordon B. Bingham and John W. Bingham, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at No. 1313 Papin street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax.

United States v. Babcock.

That afterward, to-wit, on the first day of February, in the year of our Lord one thousand, eight hundred and seventy-four, and at the said eastern district of Missouri, the said John A. Joyce, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did aid and abet in the removal from the said distillery of Alfred Bevis and Edward B. Fraser, to a place to the jurors aforesaid unknown, of a large quantity of distilled spirits, to-wit, one thousand proof gallons thereof, upon each and every proof gallon of which said spirits the internal revenue tax of seventy cents, then and there imposed by law, had not first been paid, contrary to the form of the statute of the United States in such cases made and provided, and against their peace and dignity.

DAVID P. DYER,

United States Attorney for the Eastern District of Missouri.

INDEX.

ACCOMMODATION NOTES. See *Bills and Notes*.

1. Power of partner to make. 44.
2. Power of cashier to make. 403.

ACCOMPLICE. See *Criminal Law*.

Weight due to testimony of. *United States v. McKee*, 547, 551; *United States v. Babcock*, 619.

ACTIONS. See *Assignment; Bail; Pleading and Practice, and Various Heads*.

1. Law actions may, ordinarily, be brought by *real party in interest*, where this is authorized by the state legislation. *Weed Sewing Machine Company v. Wicks*, 261; compare *Ætna Insurance Company v. H. & St. Jo. Railroad Company*. 1.
2. Liability where injury causes death. *Sullivan v. Union Pacific Railroad Company*, 335.
3. On railway aid bonds. See *Municipal Bonds*.
4. By master against wrong-doer, for negligence causing the death of his servant. *Sullivan v. Union Pacific Railroad Company*, 335.
5. "PERSONAL REPRESENTATIVE."—WHO?—An action is given by a statute of Illinois to the "personal representative" of one whose death is caused by the wrongful act of another. *Held*, that the words "personal representative" meant the executor or administrator, and that, under the statute, the widow, although the deceased died without children, and she was the sole beneficiary of the amount receivable, could not sue in her own name. *Hagen v. Kean*, 124.
6. ACTIONS FOR DEATH.—LOCAL?—Whether such an action can be maintained in another state than the one where the cause of action arose, *quære?* *Hagen v. Kean*, 124.
7. WHO MAY SUE ON WRITTEN CONTRACT.—When one who is not a party to a written agreement, but who is the person to be benefited by a performance of stipulations therein, may maintain an action against the promissor, considered. *Opdyke v. The Pacific Railroad*, 55.

AMENDMENTS. See *Pleading and Practice*.

ADMINISTRATOR.

ORIGINAL AND AUXILIARY ADMINISTRATION.—The provisions in the statutes of Iowa that "administration shall not be *originally* granted after the lapse of five years from the death of the decedent," etc., does not apply to an administration which is merely *auxiliary* to one originally granted in another state, and hence such administration may legally be granted and an administrator appointed after the lapse of five years. *Dolton v. Nelson*, 469.

ADMINISTRATOR'S SALE.

1. **NOTICE.—JURISDICTION.**—Under the circumstances, a sale of real property by an administrator was held valid upon *notice* of the petition to sell, served upon the widow and heir of the intestate, although they had before that time, but after the appointment of the administrator for the purpose of having the land subjected to the payment of debts, conveyed the lands to a third person, who was not notified of the petition of the administrator to sell. *Dolton v. Nelson*, 469.
2. *Same.*—Whether *notice* to the heir or his grantee of an administrator's petition to sell real estate of the intestate is, in any case, jurisdictional and essential to the validity of an administrator's sale in Iowa, *querre*? See *Good v. Norley*, 28 Iowa, 188, and cases cited. *Id.*

AFFIDAVIT. See *Removal of Causes*.

AGENT. See *Insurance*.

AGREEMENT. See *Contract* and *Various Heads*.

ALIEN.

Removal of causes by. See *Removal of Causes*.

ARKANSAS.

1. Constitution of the state of 1868, as to exemption to debtors, construed. *In re Handlin*, 290; *In re Cohen*, 295.
2. Cases reported from the district of Arkansas, 290—297.

ASSESSMENT. See *Corporation*; *Taxes*.

ASSIGNMENT. See *Bankrupt Law*.

1. Of right of action. *Ætna Insurance Company v. H. & St. Jo. Railroad Company*, 1.
2. Equitable assignment of calls on stockholder. *Savings Bank v. Publishing Company*, 287.

ATLANTIC & PACIFIC RAILROAD. See *Taxes and Taxation*.

ATTACHMENT.

1. Of property as means of *acquiring jurisdiction*, 474.
2. Effect of *bankrupt act* on attachments of property, 457.

ATTORNEY GENERAL. See *Mandamus*.

BAIL.

1. AUTHORITY TO TAKE.—DESCRIPTION OF OFFENCE.—Where a recognizance contains the usual provision that the party shall appear to answer to a particular charge, "and not depart said court without leave thereof," *it seems* not to be essential to its validity that *it* shall on its face describe the particular offence with which the party is accused. *United States v. George*, 451.
2. *Same*.—The recognizance in suit held to describe the particular offence with sufficient certainty.
3. *Same*.—In a proceeding upon a recognizance by declaration instead of *scire facias*, it is not necessary where the officer taking it has jurisdiction over cases of the general description named in the recognizance to aver the existence of the particular facts, which establish that the officer had authority to take it; following *People v. Kane*, 4 Denio, 580, and *State v. Grant*, 10 Minn. 39. *Ib*.

BAILMENT. See *Grain Elevators*; *Sales*.BANKRUPT LAW. See *Composition Agreements*.

1. INSOLVENT CORPORATIONS.—The bankrupt act does not furnish the sole remedy for *winding up* insolvent corporations or companies. *Chandler v. Siddle*, 477.
2. ACT OF JUNE 22, 1874.—PENDING CASES.—DISCHARGE.—The ninth section of the amendment of June 22, 1874, to the bankrupt act, which relates to the *discharge* of bankrupts, applies to cases *pending* at the time that act took effect, as well as to cases thereafter commenced. (*Denying re Franke*, 6 Chicago *Legal News*, 414.) *In re King*, 3; see *In re Lowenstein*, 145.
3. ACT JUNE 22, 1874.—HOW FAR RETROACTIVE.—While the amendment of June 22, 1874, to the bankrupt act, is retrospective in its operation, so as to bring within it all cases commenced since December 1, 1873, and in which, at the time of the passage of said amendment, the petitions for the adjudications remain to be acted on, yet it does not annul or disturb the judgments rendered or adjudications made and in force at the time of the taking effect of said amendment. *In re Obeart*, 37.
4. NUMBER AND VALUE OF CREDITORS.—In estimating the number and value of creditors who must join in the petition in involuntary bankruptcy, under section 39 of the bankrupt act, as amended by section 12 of the act of June 22, 1874, creditors who have been

BANKRUPT LAW—Continued.

- fraudulently preferred* by the debtor are not to be counted. *In re Israel*, 511.
5. *Same*.—Number and amount of creditors in bankruptcy proceedings against a *member of a firm*. See *note*, *Ib.* 515.
 6. *Same*.—SPECIAL VERDICT.—Defective *special verdict* on question as number and amount of petitioning creditors. *In re King*, 364.
 7. JUDGMENT LIENS PROTECTED.—A lien on real estate lawfully obtained under a valid judgment by a creditor before the commencement of the proceedings in bankruptcy against the judgment debtor, is protected by the bankrupt act, and is good against the assignee in bankruptcy. *Webster v. Woolbridge*, 74.
 8. LIEN CREATED BY LEASE.—An express provision in a lease by which the lessee gives to the lessor a lien on specified personal property used by the former upon the demised premises, when not in conflict with any statute, is valid against the lessee and his assignee in bankruptcy. *McLean v. Klein*, 113.
 9. EXISTING RIGHTS PROTECTED.—The assignee in bankruptcy takes the property of the bankrupt subject to all legal and equitable rights thereto existing in favor of third persons, at the time of the bankruptcy. *Hamilton v. National Loan Bank of St. Louis*, 230.
 10. *Same*.—SALE OF BONDS.—IDENTIFICATION.—This principle applied to a case where the bankrupt sold *six out of twenty specific bonds* of like character and value, in the hands of a bailee, and received pay therefor before the bankruptcy; and it was held that the rights of the purchaser of the six bonds were superior to those of the assignee in bankruptcy of the vendor. *Hamilton v. National Loan Bank of St. Louis*, 230.
 11. EQUITABLE ASSIGNMENT OF CALLS BEFORE BANKRUPTCY PROTECTED.—The bankrupt company had, before bankruptcy, duly made calls upon its members for the payment of the balance due on their stock, which thus became a debt due by each of them to the company. The company, wishing to make a loan of money of the bank, agreed, in consideration of an advance by the bank, that the bank should collect the calls and apply the amount collected from time to time on the debt created by the advance, and in pursuance of this agreement the company delivered to the bank a list of stockholders and the amount due from each on the calls, and the bank collected a portion before the bankruptcy. *Held*, that the transaction between the company and the bank amounted to an *equitable assignment* of the calls to the bank, which was not defeated by the subsequent bankruptcy of the company. *Savings Bank v. Publishing Company*, 287.
 12. LEVY BEFORE BANKRUPTCY.—Property in the hands of the sheriff, under *execution* from a state court, levied *before* the proceedings

BANKRUPT LAW—Continued.

- in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the *possession* of the sheriff by the federal court. *Townsend v. Leonard*, 370; *Bradley v. Frost*, 457.
13. *Same.*—POSSESSION OF SHERIFF.—In such a case, the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it. *Townsend v. Leonard*. 370.
14. ATTACHMENT BEFORE BANKRUPTCY.—A sheriff who sold, on execution, property previously attached by him by virtue of a judgment of a state court, which made it his duty to sell this specific property, leaving him no discretion, and who, in good faith, paid over the proceeds of the sale to the judgment creditor, without actual notice of proceedings in bankruptcy commenced after the attachment, but before the judgment and sale, is, *it seems*, not liable as in trover to the assignee in bankruptcy. *Bradley v. Frost*, 457.
15. LIABILITY OF JUDGMENT CREDITOR.—In such a case, the creditor receiving the proceeds of the sale may be compelled to pay the amount thereof to the assignee in bankruptcy, by an action in the federal court. *Id.*
16. PRIOR PROCEEDINGS IN STATE COURT.—An order to show cause upon a creditor's petition to force a co-partnership into bankruptcy in the state of Missouri, may be refused by the district court where it appears on the face of the petition that the estate of the co-partnership debtors is then in actual course of administration by the probate court under provisions of the state statute, in respect to winding up partnership estates where one of the co-partners has deceased. *In re Sectional Dock Company*. 83.
17. SET OFF.—BANK HOLDING INDORSED NOTE.—A bank holding an indorsed note may, *it seems*, set off the same against the general deposit account of the maker. *Blair v. Allen*, 101.
18. ILLEGAL PREFERENCE.—ACT OF 1874.—“KNOWING.”—Section 11 of the amendatory bankrupt act of June 22, 1874, amending section 35 of the original act by inserting “knowing,” applies to cases brought after the time when the amendatory act took effect, although the instrument creating the alleged illegal preference was executed before June 22, 1874. *Singer v. Sloan*, 110.
19. *Same.*—“CAUSE TO BELIEVE.”—“KNOWING.”—The amendment above referred to, made by section 11 of the amendatory act, works a substantial change in section 35, and within the meaning of section 11 of the amendatory act “knowing” and “having reasonable cause to believe” that a fraud on the act was intended, are not legal equivalents. *Singer v. Sloan*, 110.
20. DISCHARGE.—LIMITATION OF TIME.—Under section 29 of the bank-

BANKRUPT LAW—Continued.

- rupt act, where the limitation of time operated as a bar to the bankrupt's right to a discharge at and prior to the amendatory act of June 22, 1874, the ninth section of that act does not remove this bar. *In re Lowenstein*, 145; see *In re King*, 3.
21. DISCHARGE.—FINAL OATH.—PRESUMPTION.—After the final discharge of a bankrupt is granted, there is a strong, if not conclusive, presumption that the final oath required by section 29 of the bankrupt act was duly taken. This presumption is not overcome by the mere fact that such oath is not upon the files. *Young v. Ridenbaugh's administrator*, 239.
22. *Same*.—NUNC PRO TUNC ORDER.—Where the bankrupt died after his uncontested application for a discharge had been submitted to the court and a favorable report of the master had been made, the court has power to order the discharge to be entered *nunc pro tunc* as of the date when the master's report was first filed. *Young v. Ridenbaugh's administrator*, 239.
23. DEATH OF BANKRUPT.—Effect of the death of the bankrupt on pending proceedings in bankruptcy, considered. *Young v. Ridenbaugh's administrator*, 239.
24. EXEMPTIONS TO CO-PARTNERS.—Under the bankrupt act (secs. 14 and 36) and constitution of the state of Arkansas of 1868 (art. 12, sec. 1), bankrupts who are co-partners are not entitled to separate or individual exemptions out of the partnership effects. *In re Handlin*, 290.
25. EXEMPTION TO BANKRUPT.—Under the Revised Statutes (sec. 5045), a bankrupt is entitled to have property exempted to the amount allowed by the constitution and laws of the state in which he is domiciled, as existing in the year 1871, although the amount of such exemption was reduced by the constitution and laws of the state after 1871, and before the proceedings in bankruptcy. *In re Cohen*, 295.
26. FRAUDULENT PROOF OF DEBT.—EFFECT ON RIGHTS TO DIVIDENDS.—A creditor of a bankrupt included in his proof of debt claims against a bankrupt's estate, part of which was invalid and the rest valid, and made the claim in this manner intentionally, knowing that only part of it was legal, and supported the claim for the whole amount by a false oath. *Held*, that the effect of this fraudulent conduct on the part of the claimant was to disentitle him to any dividends whatever on any part of his claim. *Marrett v. Atterbury*, 444.
27. FRAUDULENT MORTGAGE.—SPECIAL CIRCUMSTANCES.—A company was organized as a corporation under the general laws of Missouri whose declared object was "the completion and ownership" of the St. Louis & St. Joseph Railroad; the president and vice-president

BANKRUPT LAW—Continued.

of this railroad company were secret members of the above association; a mortgage was made by the railroad company to said association. *Held*, considering the trust relations between the parties and the effect of giving judicial sanction to the mortgage, that it was constructively fraudulent; but the association was allowed to prove in bankruptcy their advance to the railroad company as an unsecured debt. *Kappner v. St. Louis & St. Joseph Railroad Association*, 228.

BANKS. See *Corporation*; *National Banks*.

POWER OF CASHIER.—A cashier, without special authority, cannot bind his bank by an official endorsement of his individual note, and the *onus* is on the payee to show the cashier's authority. *Savings Bank v. Parmlee*, 403.

BILLS AND NOTES. See *Bankrupt Act*, 16.

1. **ACCOMMODATION INDORSEMENT.—NOTICE.**—If the *maker* of an indorsed note carries it to a bank for discount on his own account, this is notice to the bank that the indorsement thereon appearing is an accommodation indorsement. Such is the presumption of law if there is nothing in the transaction to repel it. *Lemoine v. Bank of North America*, 44.
2. **ACCOMMODATION INDORSEMENT BY FIRM.—NOTICE.**—If such indorsement be that of a firm, the bank discounting the note under such circumstances, must, at its peril, ascertain whether there was any special authority, express or implied, for one partner to sign the partnership name as an accommodation indorser. *Lemoine v. Bank of North America*, 44.

BONDS. See *Bail*; *Municipal Bonds*.

BOOM. See *Constitutional Law*.

APPROPRIATION OF PROPERTY FOR.—*Measure of damages* where property is appropriated for boom purposes. *Patterson v. Boom Company*, 465, *note*.

BRIDGE. See *Municipal Bonds*; *Union Pacific Railroad*.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY.

1. **LAND GRANT CONSTRUED.**—The land grant to the Burlington & Missouri River Railroad Company (act of July 2, 1864, sections 17, 20, 13 Stats. at Large, pp. 356, 364), is not subject to the proviso in section 3 of the original act of July 1, 1862 (12 Stats. at Large, 489), giving to the public the right of settlement and pre-emption if the lands granted be not sold or disposed of within three years after the entire line of the road is completed. *Hunnewell v. Burlington & Missouri River Railroad Company*, 318.

B. & M. R. RAILROAD COMPANY—Continued.

2. **TAXABILITY OF ITS LANDS.**—Where the lands had been fully earned by the railroad company in 1871, and the cost of surveying paid as required by section 21 of said act of July 2, 1864, before the period of assessing lands for 1872 had passed, it was held that the lands were taxable, although the company did not pay the local land officer's fees until a few days after the period for making the assessment for 1872 had expired. *Hunnewell v. Burlington & Missouri River Railroad Company*, 813.

CARRIER. See *Railroad Company*.

CASHIER. See *Banks*.

CHANCERY. See *Equity*, and *Various Heads*.

CHARACTER. See *Evidence*, 551, 581.

CHATTEL MORTGAGE. See *Railroad Company*; *Railway Mortgage*.

CERTIFICATE OF STOCK. See *Corporation*.

CIRCUIT COURT. See *District Court*; *Jurisdiction*; *Union Pacific Railroad Company*.

1. **IN WHAT DISTRICT SUIT BROUGHT.—SERVICE.**—The provision in section 11 of the judiciary act of 1789, that no civil suit shall be brought by original process in the federal court in any other district than that of which the defendant is an inhabitant, or in which he shall be found at the time of serving the writ, is not repealed by the bankrupt act, nor by section 6 of the act of June 1, 1872, in respect to the attachment of property (17 Stats. at Large, 196). *Nazro v. Cragin*, 474.
2. **INFANT.—NEXT FRIEND.—CITIZENSHIP.**—The circuit court of the United States has jurisdiction of a suit in chancery, commenced on behalf of an infant, who is a citizen of another state, against a citizen of the state where the suit is brought, although the next friend of the infant complainant be a citizen of the same state with the defendant. *Williams v. Ritchey*, 406.
3. **RIGHT OF ASSIGNEE OF CHOSE IN ACTION TO SUE.**—Under the 11th section of the judiciary act, the assignee of a chose in action may sue in the federal court, if the assignor might, at the time suit was brought, have there prosecuted the suit, if no assignment had been made; and this, although the assignor was, at the time the assignment was made, a citizen of the same state with the maker. *White v. Leahy*, 878.
4. **JURISDICTION OVER SUITS BY AND AGAINST CORPORATIONS.** See *Corporations*; *Removal of Causes*.
5. **SUITS BY AND AGAINST NATIONAL BANKS.** See *National Banks*.

CIRCUMSTANTIAL EVIDENCE.

Rules to measure sufficiency. *United States v. Babcock*, 581.

CITY. See *Municipal Corporation*; *Wharfage Tax*.

CITIZENSHIP. See *Circuit Court*; *Corporations*.

COLLECTOR OF CUSTOMS.

1. **COMPENSATION.**—As respects the compensation of collectors of customs, the legislation of congress divides these officers into two classes: 1st, collectors of the seven enumerated ports; 2d, all other collectors, i. e. collectors of non-enumerated ports (22 How. 299). *Donovan v. United States*, 53.
2. *Same.*—The acts of 1822, 1831, 1841, 1857, and of 1872, as to the compensation of collectors and surveyors of ports, construed, and it was held that the aggregate compensation of the surveyor of the port of St. Louis, charged with the duties of the collector of customs, could not exceed the sum of \$5000 in any one year. *Donovan v. United States*, 53.

COMPENSATION. See *Collector of Customs*.

COMPOSITION AGREEMENT.

RIGHT TO RECURE TO ORIGINAL DEBT.—A creditor having demanded payment in full in advance, as a condition of consenting to sign a composition agreement of the debtor to pay all his creditors seventy cents on the dollar, was held liable to repay the amount to the assignee in bankruptcy (2 Dillon, 108); subsequently, on paying back the amount to such assignee of the debtor, the creditor sought to prove his *original debt* in bankruptcy, the composition having failed: *Held*, under the circumstances, that he was entitled to establish his debt and receive dividends thereon. *Brookmire v. Bean*, 136.

CONDEMNATION. See *Removal of Causes*.

CONSPIRACY. See *Criminal Law*.

1. Great conspiracy to defraud revenue in St. Louis, from 1871-1875; its extent and nature. *United States v. McKee*, 551.
United States v. Babcock, 581.
2. *Declarations* of co-conspirators, when and for what purpose competent evidence. *United States v. McKee*, 546, 551.
United States v. Babcock, 581.
3. *Form of Indictment* for conspiracy to defraud revenue. *United States v. Babcock*, 623.

CONSTITUTIONAL LAW. See *Information; Libel; Municipal Bonds; Taxes and Taxation; Wharfage Tax.*

1. RAILWAY AID.—MISSOURI.—The provision of the state constitution of Missouri, of 1865, as to aid to railways, amendatory acts and titles to acts, discussed. *Foster v. Callaway County*, 200.
2. FEE APPROPRIATED FOR BOOM.—The legislature may constitutionally authorize the *fee* of private property to be *taken for a boom*, to be built and operated by an incorporated company, over which and its charges, legislative control is reserved. *Patterson v. Boom Company*, 465.
3. Measure of damages in such case, *Ib.*

CONTRACTS. See *Municipal Bonds.*

1. When a person, beneficially interested, may sue on a written contract: *Opdyke v. Pacific Railroad*, 55.
2. LOBBYING CONTRACTS.—A contract providing a compensation for preventing legislative investigation into the affairs of a railway corporation, is void:—this principle applied and held to vitiate the defendant's claim to the land in controversy, and the complainant's title was quieted. *Usher v. McBratney*, 385.
3. Cases on subject of lobbying contracts collected. *Ib. note.*

CORPORATIONS. See *Municipal Corporations; Railroads.*

1. *Insolvent Corporations*, how wound up. *Chandler v. Siddle*, 477.
2. STOCKHOLDER'S RELATION AND LIABILITY.—The *three-fold relation of stockholders* in an incorporated company, to the corporation, to other stockholders, and to the creditors of the corporation, considered. *Upton v. Englehart*, 496.
3. FRAUD.—The *effect of fraud* practised by an agent of a company, to induce a person to subscribe for stock therein, considered, and the doctrine asserted, that as between the company and the person thus induced by fraudulent and deceptive statements to take stock therein, the same principles apply as would apply to like contracts between individuals. *Ib.*
4. *Same.*—In such a case the company cannot retain any benefit which it has obtained through the fraud of its agent, and it is ordinarily no answer to the claim of a person to be relieved against a contract procured from him by a fraud, to show that by more inquiry he could have learned the truth. *Ib.*
5. *Same.*—A *contract to purchase shares* induced by fraudulent representations or concealment is not void, but only voidable—that is, it is valid until disaffirmed, and not void until affirmed. And where the rights of creditors are concerned, the contract must be repudiated promptly on discovering the fraud, or it will be held binding as to them. *Ib. Farrar v. Walker*, 506, *note.*

CORPORATIONS.—Continued.

6. **REPUDIATION.**—How?—When?—How repudiated and when, see cases cited in the opinion, and see note, and *Upton v. Triplecock*, U. S. Sup. Court, Oct. term, 1875. *Upton v. Englehart*, 496.
7. *Same.*—Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation, to take stock in the corporation two years before its bankruptcy, for which he gave in payment his note, secured by deed of trust on real estate and during that period made no inquiry as to the true condition of the corporation, but suffered his notes to be held out to the public as assets of the corporation—the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the notes. *Farrar v. Walker*, 506, note.
8. **MEMBERSHIP.**—**CERTIFICATE.**—A certificate of stock is not essential to constitute membership in a joint stock corporation. *Id.*
9. **ASSESSMENT.**—**CALLS.**—A call or assessment, or some equivalent action, held essential to the liability of the defendant on his contract to purchase shares of stock in an incorporated company. *Chandler v. Siddle*, 477.
10. *Same.*—**ASSIGNMENT.**—Right of assignee by equitable assignment of calls previously made on stockholders for payment of balance due on stock. *Savings Bank v. Publishing Company*, 287.
11. **CITIZENSHIP.**—**OF WHAT STATE.**—For the purpose of federal jurisdiction, a corporation is conclusively considered as if it were a citizen of the state which created it. (See *Removal of Causes*.) *Williams v. Missouri, Kansas & Texas Railway Company*, 267.
12. *Same.*—This principle applied, and the defendant company held to be a citizen of the state of Kansas, under whose laws it was organized, and not of Missouri, under whose laws it had gone into that state and purchased and was operating therein a line of railway in connection with its line in Kansas. *Williams v. Missouri, Kansas & Texas Railway Company*, 267.
13. *Same.*—The case in judgment considered to be analogous to that of the *Baltimore and Ohio Railroad Company v. Harris*, 12 Wall. 65, and distinguishable from the *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 236. *Williams v. Missouri, Kansas & Texas Railway Company*, 267.
14. Notice to corporation, 44, 403, 405.

COUNTY. See *Municipal Bonds*.

COUPONS. See *Municipal Bonds*.

COURTS. See *Circuit Court*; *District Court*.

Relative functions of court and jury stated. *United States v. Babcock*, 577.

CREDIBILITY.

Tests of credibility of witnesses. *United States v. Babcock*, 619.

CRIMINAL LAW. See *Bail*; *Conspiracy*; *Evidence*; *Habeas Corpus*; *Libel*.

1. PROSECUTION BY INFORMATION.—Offences “not capital or otherwise infamous” may, by leave of court, upon complaint on oath, be prosecuted in the federal courts by criminal information. *United States v. Maxwell*, 275.
2. REVENUE FRAUD BY DISTILLERS.—The sections of the Revised Statutes under which the indictments were drawn, continue in force, notwithstanding a later act, prescribing a different punishment. The Revised Statutes contain a general provision modifying the common law doctrine in this respect, which is construed and applied. *United States v. Ulrici*, 582.
3. INDICTMENT.—*Requisites of indictment* against distiller for conspiracy to defraud the United States of the internal revenue tax, considered; and held not essential to state, in addition to an intent to defraud, the facts showing such intent. *Ib.*
4. *Same*.—Where the charge is of an *attempt* to defraud, the pleader should specify some acts which constitute the attempt. *Ib.*
5. *Same*.—A count for the *removal of distilled spirits* from the distillery to a place other than the distillery warehouse, held sufficient.
6. INTENT.—Under the legislation of congress (Revs. Stats. sec. 3,224), an indictment, for failing to *efface, etc., marks and brands*, at the time of emptying the cask or package, need not aver a *criminal intent*. *Ib.*
7. *Same*.—So as to a person having in his possession *tax-paid stamps* once used. In the cases last mentioned, congress has not made criminal intent an element of the offences. *Ib.*
8. WHO LIABLE.—Whether the punishment is limited to the person who actually empties the highwines, or extends as well to his employer, *quære?* *Ib.*
9. CONSPIRACY—WHO JOINED.—Under the legislation of congress, an officer of the internal revenue, named as such in the indictment, *cannot be jointly indicted* for a conspiracy to defraud the revenue with *private persons*. (See *Conspiracy*.) *United States v. McDonald*, 543.
10. MERGER.—The doctrine of *merger* does not apply to *misdemeanors*; and the present indictment held good, though it charged a *completed offence*, in addition to a *conspiracy* to commit it. *United States v. McDonald*, 543.
11. *Bail* in criminal cases. See *Bail*.
12. *Removal of criminal offenders* to another district for trial; 116.
13. Evidence in criminal cases. See *Conspiracy*; *Criminal Law*.
14. *Limitation of criminal proceedings*, 381.
15. *Defective indictment* as ground for discharge of prisoners. *In re Buell*, 116.

CURATIVE ACT. See *Municipal Bonds*, 402.

DAMAGES.

1. Measure of damages under policy on "freight." *Stillwell v. Home Insurance Company*, 80.
2. Appropriations of private property for "boom" purposes. *Patterson v. Boom Company*, 465, note.

DEATH.

1. Action by "personal representative." *Hagen v. Kean*, 124.
2. Death of *infant child*, caused by wrongful act of another. Remedy of parent or master in such case. *Sullivan v. Union Pacific Railroad Company*, 335.
3. Death of *bankrupt*: effect on pending proceedings in bankruptcy, 239.

DEPOT. See *Municipal Bonds*.

DIRECTOR. See *Corporations*.

DISCHARGE. See *Bankrupt Law*.

DISPATCHES. See *Evidence; Telegraph Company*.

DISTILLERS. See *Conspiracy; Criminal Law; Informations in Rem*.

DISTRICT OF COLUMBIA.

1. Criminal libels published therein indictable. *In re Buell*, 116.
2. Removal of offenders to the District of Columbia for trial, *Ib*.

DISTRICT COURT. See *Bankrupt Law; Circuit Court*.

1. JUDGMENT.—MODE OF REVISION.—The manner in which the proceedings and judgments of the district courts in actions at law must be revised and re-examined on error in the circuit court. *Blair v. Allen*, 101.
2. WAIVING JURY.—MODE OF TRIAL.—The act of March 3, 1865 (18 Stats. at Large, 501, sec. 4), as to waiving a jury and trying issues of fact by the court, applies exclusively to the circuit courts. Its provisions do not extend to the district courts. *Blair v. Allen*, 101.

DISTRICT JUDGE.

Duty and power of, in respect to the removal of criminal offenders for trial into the district where the offence was committed. *In re Buell*, 116.

ELECTIONS.

Preliminary to issue of municipal securities. See *Municipal Bonds*.

ELEVATOR. See *Grain Elevator*.

EMINENT DOMAIN. See *Boom*; *Constitutional Law*; *Removal of Causes*.

EQUITY. See *Injunction*; *Taxes*.

ERROR. See *District Court*; *Pleading and Practice*.

ESTOPPEL. See *Municipal Bonds*.

EVIDENCE.

1. Weight of testimony of *accomplices*. United States v. McKee, 547, 551; United States v. Babcock, 577, 581.
2. Declarations of *co-conspirators* when and for what purpose competent. United States v. McKee, 547, 551; United States v. Babcock, 581.
3. *Reasonable doubt*, what? 551; United States v. McKee, 551; United States v. Babcock, 581.
4. *Good character of the defendant* for what purpose to be considered by the jury. United States v. McKee, 551; United States v. Babcock, 581.
5. In criminal cases. See *Conspiracy*; *Criminal Law*.
6. Proof of receipt of letters and telegraphic messages, 571, 574, 581.
7. Circumstantial evidence in criminal cases. United States v. Babcock, 581.

EXECUTION. See *Railway Mortgage*.

1. SALE AFTER RETURN DAY.—Without statute provision an execution is *functus officio* after the return day; but by the legislation of Missouri, where a levy on land has been duly made, the power to sell exists after return day, for the *execution* and lien thereby created are by statute continued in force until the end of the second or later term of the proper court, if a sale be not made at the next term after the levy. Webster v. Woolbridge, 74.
2. *Same*.—These principles applied and held to preserve a lien of a judgment creditor although no sale had been made under his levy. Webster v. Woolbridge, 74.

EXEMPTION. See *Arkansas*; *Bankrupt Law*.

Homestead exemption law of congress valid. Seymour v. Sanders, 437.

FEDERAL AND STATE COURTS. See *Bankrupt Law*; *Circuit Court*; *District Court*; *Removal of Causes*; *State Courts*.

FELLOW SERVANT. See *Master and Servant*.

FELONIES. See *Criminal Law*.

FIXTURE. See *Railway Mortgage*.

FLEEING FROM JUSTICE. See *Limitation of Criminal Prosecutions*.

Construction of act of 1790. United States v. O'Brian, 381.

FORECLOSURE. See *Mortgage; Railway Mortgage*.

FOREIGN JUDGMENT.

Where laws of a state so provide, a valid judgment against a surety, in a bond given in the progress of a case, may be entered without notice. Kuhn v. McMillan, 372.

FORFEITURE. See *Internal Revenue*.

FRADULENT CONVEYANCE. See *Bankrupt Law*.

GRAIN ELEVATOR.

1. GRAIN RECEIPTS.—SALE.—BAILMENT.—Where grain is stored in an elevator warehouse with the understanding, implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of the like quality, but not the identical grain deposited, nor grain from any specific mass, the transaction is a sale and not a bailment. *Rahilly v. Wilson*, 420, 429.
2. Criteria of sales and bailments stated, *Ib.*; see *Hamilton v. Bank*, 230.

HABEAS CORPUS. See *Libel*.

LIBEL.—DEFECTIVE INDICTMENT.—The petitioner was indicted in the District of Columbia for the offence of criminal libel, and was discharged on *habeas corpus* in the eastern district of Missouri from commitment under a commissioner's warrant issued in the last named district—the ground of the discharge being that the indictment failed to allege a *publication* of the libel in the District of Columbia. *In re Buell*, 116.

HOMESTEAD ACT OF CONGRESS.

1. ACT CONSTITUTIONAL.—The fourth section of the homestead act of congress of May 20, 1862 (12 Stats. at Large, 393), which provides that no lands acquired thereunder shall, in any event, become liable to any debt contracted prior to the issuing of the patent therefor, is valid and binding upon the states. *Seymour v. Sanders*, 437.
2. *Same*.—The power of congress to dispose of the public domain, and the policy of the above exemption provision in the homestead act, considered. *Ib.*
3. *Same*.—See cases on subject. *Ib.* 443, note.
4. Exemptions under the bankrupt act. 290, 295.

INDIANS.

1. Treaty with *Wyandot* Indians construed. 393, 413.
2. *Indian will* sustained. 393.
3. WYANDOT TRIBE.—Relation of the Wyandot Indians to the civil laws of the territory of Kansas, in respect to the disposition of property before and after the treaty of 1855, considered. *Gray v. Coffman*, 393; *Mungosah v. Steinbrook*, 418.
4. MIAMI TRIBE.—MODE OF ALIENATION OF LANDS.—The laws of the state of Kansas have no application to the mode of alienation of lands granted to the Miami Indians (10 *Stats. at Large*, 1093; 11 *Ib.* 430), so long as the title remains in the patentees. *Mungosah v. Steinbrook*, 418.
5. The case of the Kansas Indians (5 *Wall*. 737) applied, *Ib.*

INDICTMENT. See *Criminal Law*; *Information*.

- Form of indictment for conspiracy to defraud the revenue. *United States v. Babcock*, 623.

INDORSER. See *Bankrupt Law*, 16.INFANT. See *Death*; *Parent and Child*.

Jurisdiction of circuit court over, See *Circuit Court*.

INFORMATION.

- Prosecution by, when authorized. *United States v. Maxwell*, 275.

INFORMATIONS IN REM.

NOTICE.—Section 3459 of the Revised Statutes prescribed the notice required and not the previous rules of the court. *United States v. Adler*, 285.

REQUISITES OF INFORMATION.—In an information under section 3453 of the Revised Statutes, it is sufficient to follow the language of the statute and the allegation held sufficient without an express averment that the taxes on the spirits were not paid. *United States v. Adler*, 285.

INJUNCTION.

To restrain issue of municipal bonds, 300, 359; to restrain collection of taxes, see *Taxation and Taxes*.

INSURANCE.

1. ASSIGNMENT OF RIGHT BY ASSURED TO INSURER.—WHO MAY SUE WRONG-DOER.—Where insured property has been destroyed by a wrong-doer, and the insurer has paid to the owner on the policy less than the value of his loss, and taken a partial assignment of his right, he cannot sue the wrong-doer in his own name, for the injury, either as at common law or under the statute of Missouri

INSURANCE—Continued.

- The action must be in the name of the owner of the property destroyed. *Aetna Insurance Company v. Hannibal & St. Joseph Railroad Company*, 1.
2. **WARRANTIES AND REPRESENTATIONS, DISTINGUISHED.**—Where no specific and distinct reference was made in the policy to the written application, the statements in the latter, although it referred to the policy, and contained a warranty, were considered as representations, and not as warranties. The recent leading cases on this subject cited. *Conover v. Massachusetts Insurance Company*, 217.
3. **UNTRUTHFUL ANSWERS IN APPLICATION.**—Where the policy itself contains a condition that if the statements made by the applicant in the negotiations for the policy shall prove untrue, the policy shall be void, untruthful answers to material questions relating to the health and habits of the assured, will defeat the right to recover thereon, though the matters misrepresented did not cause or contribute to his death. *Conover v. Massachusetts Insurance Company*, 217.
4. **LOCAL LEGISLATION IN MISSOURI.**—The act of the Missouri legislature of March 23, 1874, as to insurance policies, commented on and held not to apply to the case in judgment. *Conover v. Massachusetts Insurance Company*, 217.
5. **LIFE POLICY.—INSURABLE INTEREST OF CREDITOR.—SURRENDER OF POLICY BY CREDITOR.**—A policy of insurance was issued for \$3,000 upon the life of a debtor, payable upon his death to his creditor: on the death of the assured, the creditor holding the policy received from the insurer \$2,050.57, "in full of all claims under the policy," and surrendered it; afterwards the creditor assigned "all his right, title, and interest in the policy" to the administratrix of the assured, subject to the amount he had received from the company in payment of his debt: *Held*, that an action by the administratrix, under such assignment, against the insurer for the balance of the \$3,000 could not be maintained. *McKenty v. Insurance Company*, 448.
6. **SPECIAL CONTRACT FOR PAID-UP POLICY.**—Construing the provision of the policy in suit, in the light of the practical construction put upon similar policies by the company. *Held*, that the plaintiff was entitled, on electing to discontinue the payment of premiums, to a paid-up policy, without first paying a note held by the company for part premiums, but that said note, with interest, less the dividends, was to be deducted from the amount insured when the policy became payable. *Dutcher v. Brooklyn Life Insurance Company*, 87.
7. **POLICY ON FREIGHT.—WHAT IT COVERS.**—A freight policy insured "the freight of the steamboat Commonwealth, and barge, against

INSURANCE—Continued.

total loss of any part of the steamer or barge's freight at and from St. Louis to New Orleans," etc. *Held*, that the policy was not limited to the freight list for goods on board at St. Louis when the voyage was begun, but in view of the well-known usage of boats in the Mississippi trade to touch at intermediate ports, it covered additions to the cargo received in the usual manner at such ports. *Stillwell v. Home Insurance Company*, 80.

8. MEASURE OF DAMAGES.—Where the barge was sunk on the voyage by one of the perils insured against, and its cargo was transferred to the boat, which had the effect fully to load the boat, and where other cargo to the full capacity of *both* boat and barge had been actually engaged at intermediate ports for the trip, and no other barge could be obtained: *Held*, that the actual loss of the freight, which would have been earned if the barge had not been lost, was covered by the policy. *Stillwell v. Home Insurance Company*, 80.

9. DOUBLE INSURANCE.—A second fire policy invalid by reason of misrepresentation as to prior insurance, does not constitute additional insurance within the meaning of the usual condition against other insurance contained in a prior policy, in another company. *Carpenter v. Providence Insurance Company*, 16 Pet. 495, distinguished. *Allison v. Phoenix Insurance Company*, 480.

10. *Same*.—Whether a second valid insurance on *furniture* not notified to the company issuing the first policy which covered *other* property *separately valued as well as furniture*, avoids the first policy *in toto* or only as to the furniture, *quære?* See cases cited. *I b.*

INTERNAL REVENUE. See *Conspiracy; Criminal Law; Informations in Rem.*

DISTILLED SPIRITS.—TOOLS, ETC.—FORFEITURE.—The tools, etc., found and seized in the place where the distilled spirits were found and seized were, under the averments, subject to seizure and forfeiture. *United States v. Adler*, 285.

INVENTIONS. See *Patents for*.

IOWA.

Cases reported from the district of Iowa, 469, *et seq.*

JUDGMENT.

1. NOTICE.—JURISDICTION.—Where the laws of a state provide that bonds given to release property from attachment, and conditioned for its re-delivery to the officer, shall form part of the record, and that judgment thereon, in the event of the plaintiff's recovery, shall be entered against the principal and surety of such bond

JUDGMENT—Continued.

without *scire facias* or notice, a judgment thus entered is not void as to the surety for want of notice, although such surety may, at the time, be a non-resident of the state. *Kuhn v. McMillan*,

372.

2. RECORD ENTRY OF APPEARANCE.—Record of a judgment entry held to show an appearance by the party praying an appeal from such judgment, as to proceedings subsequent thereto. *Kuhn v. McMillan*,

372.

JUDGMENT LIENS.

How affected by bankrupt act,

74.

JUDICIARY ACT. See *Bankrupt Law*; *Circuit Court*; *Mandamus*; *Removal of Causes*.

JURISDICTION. See *Bankrupt Law*; *Circuit Court*; *District Court*; *Removal of Causes*.

1. HOW RAISED.—Objection to the jurisdiction may be taken by motion, and is not waived by subsequently pleading to the merits. *Nazro v. Cragin*,

474.

2. Over corporations as respects citizenship. *Williams v. Missouri, Kansas, & Texas Railway Company*,

267.

JURY.

1. Waiver of; act of March 3, 1865 (13 Stats. at Large, 501, sec. 4), does not extend to the district court. *Blair v. Allen*,

101.

2. Relative functions of court and jury defined. *United States v. Babcock*,

577.

KANSAS.

1. MUNICIPAL BONDS.—Bridge bonds—construction of local statute respecting; Kansas Municipal Bond Registration Act construed; Kansas Municipal Bond Curative Act construed; election and conditions precedent to issue of bonds—see cases in note,

389, 391, 402.

2. INDIAN LANDS.—Indian titles in Kansas. *Gray v. Coffman*, 393; *Hicks v. Butrick*, 413; *Mungosah v. Steinbrook*,

418.

3. Cases reported from district of Kansas,

370, *et seq.*

LANDLORD AND TENANT.

1. LEASE—ASSIGNMENT OF.—The assignment, transfer, and delivery of a lease by the lessor to secure a debt, is valid as against the assignee in bankruptcy of the lessor. *Meador v. Everett*,

214.

2. Lien created by lease. *McLean v. Klein*,

113.

LAND GRANT. See *Burlington & Missouri River Railroad Company*; *Public Lands*; *Railroad Company*; *Taxes*; *Union Pacific Railroad Company*.

LAND WARRANT.

1. RIGHTS OF ASSIGNEE.—The assignee of a land warrant, fraudulently procured from the government, has no higher legal rights than the warrantee; and the government, although the warrant is regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value and without notice. *Bronson v. Kukuk*, 490.
2. Taxability of lands located by fraudulent warrant cancelled before patent issued. *Ib.*

LETTERS.

Presumption as to receipt of, when deposited in the post-office. *United States v. Babcock*, 571, 581.

LIBEL. See *Habeas Corpus*; *Publication*.

PUBLICATION.—*It seems*, that for a libel composed and published in the District of Columbia, the offender may be *there* indicted and punished as for an offence against the laws of the United States. *In re Buell*, 116.

2. PUBLICATION, WHAT. — What constitutes a *publication* in the legal sense, within the district, considered. *In re Buell*, 116.

LIFE INSURANCE. See *Insurance*.

LIMITATION OF CRIMINAL PROSECUTIONS.

LIMITATION.—FLEEING FROM JUSTICE.—A “fleeing from justice” within the meaning of the act of congress limiting criminal prosecutions, is to leave one’s home, residence, or known place of abode, within the district, or to conceal one’s self therein, with intent, in either case, to avoid detection or punishment for some public offence against the *United States*. *United States v. O’Brian*, 381.

LOGS. See *Boom*.

MACHINERY. See *Master and Servant*.

MANDAMUS.

1. To compel *Union Pacific Railroad Company* to operate its road as required by law. *Hall v. Union Pacific Railroad Company*, 515.
2. *Private persons* may institute proceedings against the company, *Ib.*
3. Cases in which the *attorney general* must, and in which private citizens may apply for the writ, considered, *Ib.* [The doctrine of

MANDAMUS—Continued.

- this case has since been affirmed by the supreme court. *Union Pacific Railroad Company v. Hall*, Oct. term, 1875.]
4. SERVICE OF PROCESS.—Service of writ of mandamus on whom made and where, to compel the railroad company to operate its road according to law. *United States v. Union Pacific Railroad Company*, 524.
 5. TO COLLECT SPECIAL TAX.—When the court will order a *special* tax against a county to pay a judgment; the practice in such cases stated. *United States v. Vernon County*, 281.
 6. TO COLLECT TAX.—A judgment creditor of a county whose judgment was recovered on negotiable bonds who has received a warrant on the treasurer which is refused payment, may have a *mandamus* to enforce the collection of a tax to pay such judgment, and is not bound to wait and take his turn among other warrant-holders. *United States v. Vernon County*, 281.
 7. *Same*.—Mandamus in Missouri on *township* railroad aid bonds. *Jordan v. Cass County*, 185.

MASTER AND SERVANT.

1. Liability of master for *wilful* tort of servant, 329, *note*. [See *Mackay v. Commercial Bank of New Brunswick*, Law Rep. 5 Privy Council Cases, 394.]
2. LIABILITY OF MASTER TO SERVANT.—NEGLIGENCE OF "FELLOW-SERVANT."—The courts of Great Britain and America have established the general doctrine of the non-liability of the employer for an injury to one servant caused by the negligence of another servant in the same common employment; and this doctrine of general jurisprudence, as it involves no *federal question*, is no more open to judicial denial in the federal courts than in the state courts, or the ordinary common law tribunals. *Dillon v. Union Pacific Railroad Company*, 319.
3. *Same*.—DEFECTIVE MATERIALS AND STRUCTURES.—But the employer, though he may act through others, is bound to use ordinary care in providing competent servants and safe materials and structures, and is responsible to any servant who is injured by negligence in this respect: the rule as to "fellow-servants" does not extend to such a case. *Dillon v. Union Pacific Railroad Company*, 319, 328, *note*.
4. *Same*.—WAIVER OF MASTER'S FAULT.—SERVANT'S KNOWLEDGE.—A servant by voluntarily continuing in the employ of the master with knowledge of the incompetency of the fellow-servant, or of defective machinery and the danger to which this may expose him, waives (unless upon some special ground) the right to recover for injuries thereby caused. *Dillon v. Union Pacific Railroad Company*, 319.

MASTER AND SERVANT—Continued.

5. *Same.*—WANT OF SIGNAL BELL.—These principles applied to the case in judgment—(an action by a locomotive engineer, who sued for an injury which happened in consequence of the want of a signal bell in the cab of his engine, which was known to him from the time he entered the defendant's employ)—and it was held on demurrer that the petition did not set forth a case showing that the defendant was liable. *Dillon v. Union Pacific Railroad Company*, 319.
6. DEATH OF SERVANT.—MASTER'S REMEDY.—Where a servant is killed *on the spot*, by the wrongful act of the defendant, the master may recover for the loss of service. Where the death does not immediately ensue, but afterwards takes place, the master is not limited in the estimate of his damages to the period of the servant's death. *Sullivan v. Union Pacific Railroad Company*, 334.
7. *Same.*—Such a case distinguished from one for an injury to the servant himself. Without a statute an action for such injury does not survive the death of the person injured, and cannot be brought by his representatives or next of kin. *Sullivan v. Union Pacific Railroad Company*, 334.

MERGER. See *Criminal Law*.MESSAGE. See *Telegraph Company*.

MINNESOTA.

Cases reported from the district of. 420, *et seq.*MISDEMEANOR. See *Criminal Law*.

MISSOURI.

Cases reported from *Eastern* district of Missouri, 1 *et seq.*
 Cases reported from the *Western* district of Missouri, 147 *et seq.*

MORTGAGE. See *Railway Mortgage*.MOTIONS. See *Jurisdiction*.MOTIVE. See *Criminal Cases*, 581.

MUNICIPAL BOND CASES.

1. Scotland County case, Missouri, 7.
2. Cass County cases, " 147, 185, 245, 25.
3. Bates County case, " 150.
4. St. Clair County case, " 163.
5. Dallas County case, " 171.
6. Buchanan County case, " 175.

MUNICIPAL BOND CASES—Continued.

7. Plattsburg (City) case, Missouri,	181.
8. Pleasant Hill (City) case, "	195.
9. Cameron (Town) case, "	198.
10. Callaway County case, "	200.
11. Vernon County cases, "	210, 281.
12. Lafayette County case, "	236.
13. Lincoln County case, Nebraska,	300.
14. Merrick County case, Nebraska,	359.
15. Montgomery County case, Kansas,	389.

MUNICIPAL BONDS.

1. POWER TO ISSUE ESSENTIAL.—The bonds in suit held void in the hands of a *bona fide* holder, for want of legislative authority to issue them. *Sherrard v. Lafayette County*, 236.
2. STATE COURT DECISIONS.—Although the decisions of the supreme court of a state, expounding the effect of the state constitution and laws upon securities issued by a municipal corporation, are not necessarily conclusive upon the federal courts, yet they will be followed, unless good reasons appear to the contrary. *Thomas v. County of Scotland*, 7.
3. *Same*.—Legislation of Missouri, as to power to municipalities to subscribe to the stock of railways, the constitutional provision of 1865, and the decisions of the supreme court of the state on the subject, reviewed, and those decisions followed and applied. *Nicolay v. St. Clair County*, 163.
4. *Same*.—The decisions of the supreme court of Missouri, in *State ex rel. etc. v. Sullivan County*, 51 Mo. 522; *Smith v. Clark County*, 54 Mo. 58, and *State v. Green County*, January term, 1874, 54 Mo. 540, which hold that a provision in the charter of a railway company granted by act of the legislature, authorizing and empowering counties through which the road shall pass to subscribe for its stock and issue its bonds in payment of the same, is a "privilege" of the railway company, which is not taken away by a subsequent constitutional ordinance, are approved and followed. *Thomas v. County of Scotland*, 7.
5. POWER.—CONSTITUTION OF MISSOURI OF 1865.—Charters of railroad corporations, existing at the date of the adoption of the constitution of Missouri of 1865, and which granted authority to counties to subscribe for stock of railroads, and to issue bonds to pay for the same, without a vote of the people, were not affected by the provision of the constitution (art. 11, sec. 14), requiring a two-thirds vote: So held by the state supreme court in what is known as the *Macon County Case*, 41 Mo. 453, and which is followed by this court. *Huidekoper v. Dallas County*, 171.

MUNICIPAL BONDS—Continued.

- [The constitution of Missouri of 1875 contains absolute prohibitory provisions as to the issue of such bonds.]
6. **INTEREST IN GOLD.**—The interest of authorized bonds may be made payable in gold. *Pollard v. Pleasant Hill*, 195.
 7. **POWER.**—**CALLAWAY COUNTY, MISSOURI BONDS.**—The power conferred upon counties along the route of the Louisiana and Missouri River railroad company by the charter of that company of March 10, 1859, to subscribe for its stock without a vote of the people, was not taken away as respects Callaway county, by the amendatory act of March 24, 1868. *Foster v. Callaway County*, 200.
 8. **ENJOINING ISSUE.**—Upon proper application, the issue of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance. *Union Pacific Railroad Company v. Lincoln County*, 300.
 9. *Same.*—The issue of bonds by a county to a railroad company will not be restrained where the requirements of the statute authorizing the issue have been complied with. *Union Pacific Railroad Company v. Merrick County*, 359.
 10. *Same.*—**PRINCIPLE APPLIED.**—**CONDITIONS OF VOTE.**—A vote by a county to issue bonds to a given railroad company, whose line runs to the county seat, is not rendered invalid by a condition that a *depot* of a company shall be located within a specified distance of the county seat, nor by a condition that the railroad bridge over a large stream in the county shall be so constructed that it may be used as a free *wagon bridge*. *Ib.*
 11. *Same.*—**LEGISLATION OF NEBRASKA.**—An act of the legislature of Nebraska, in respect to the issue of such bonds, construed, and it is held, where the statute required such bonds to be paid in *ten* years, that a vote authorizing bonds to run *twenty* years was such a material departure from the statute that the court would enjoin the issue of the bonds. *Union Pacific Railroad Company v. Lincoln County*, 300.
 12. **MODE OF SIGNING.**—If the *bonds* to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defence to an action on the coupons that they are signed by only one of the county officers. *Thayer v. Montgomery County*, 389.
McKee v. Vernon County, 210.
 13. **MODE OF EXECUTION.**—**SUBSTITUTION.**—**ESTOPPEL.**—**NON EST FACTUM.**—The agent of the county and the presiding justice of the county court *substituted* engraved bonds, the signatures on the coupons of which were lithographed, for printed bonds, the new bonds being of the same date and amount as the old, and the old being at the same time destroyed; there was no order of the county court for the substitution, but the county afterwards paid interest for two

MUNICIPAL BONDS—Continued.

- years, retained the certificate of stock, which was the consideration of the bonds, and entered of record other reasons than the substitution, for ceasing to pay interest on the new bonds: Held that the plea of *non est factum* was not sustainable as a defense to an action to recover coupons on the new bonds. *McKee v. Vernon County*, 210; *Thayer v. Montgomery County*, 389.
14. **REQUISITES OF DECLARATION.**—A declaration upon county bonds should show by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. This principle applied, and the declaration held sufficient. *Thayer v. Montgomery County*, 389; *Kennard v. Cass County*, 147.
15. **DECLARATION.**—**POWER TO ISSUE NEGOTIABLE PAPER.**—Where there is no general authority in a public corporation to make negotiable paper, the special authority should be stated in the declaration, or by alleging the recital of the bond in that respect. *Kennard v. Cass County*, 147.
16. **MODE OF DECLARING.**—In declaring on coupons, the instruments in suit should be identified on the face of the declaration by the number of the bond, date, sum and time of payment. *Kennard v. Cass County*, 147.
17. **WHO MAY SUE.**—**COUPONS.**—The holder of coupons payable to bearer, may sue thereon, without producing or being interested in the bonds to which they were originally attached. *Kennard v. Cass County*, 147.
18. **PRESUMPTION OF REGULARITY.**—Where legislative power is given to a county court, to subscribe on behalf of the county to the stock of a railroad company without restriction or precedent conditions, and to issue negotiable bonds in payment therefor, and the proper county court issues the bonds, reciting therein that they are issued under an order of said court made pursuant to legislative act conferring the power, a *bona fide* holder for value is not affected with constructive notice of facts recited in the order contrary to the recitals in the bonds. *Nicolay v. St. Clair County*, 163.
19. **PRESUMPTION.**—**IRREGULARITIES.**—**ELECTION.**—Where legislative authority is conferred upon a municipal or public corporation to issue bonds on the sanction of the voters to be given at an election, and the officers of the corporation are by the law to decide whether the requisite sanction has been given, and they issue bonds which recite it, no irregularity in the manner of appointing the judges of the election, or in submitting the question is a defense to the bonds thus issued, when in the hands of *bona fide* holders for value, without actual notice. *Huidekoper v. Buchanan County*, 175.
20. **ELECTION.**—**REGISTRATION OF VOTERS.**—It seems that a special registration of voters of a special municipal election was not necessary; but if it were, a *bona fide* holder of bonds for value without notice

MUNICIPAL BONDS—Continued.

- would not be affected by the omission, the bonds reciting that they were duly authorized by a vote of the voters of the city. *Judson v City of Plattsburg*, 181.
21. **EFFECT OF RECITALS IN BONDS.**—An innocent holder for value of negotiable municipal bonds is not bound to look further than to see that authority of law for their issue exists, and may rely upon the recital in the bonds that the preliminary conditions have been complied with by the municipal officers, to whom the matter is confided by the legislation authorizing the issue of the bonds. *Pollard v. Pleasant Hill*, 195.
22. *Same.*—**FUNDING BONDS.**—The *funding bonds* issued by the defendant city fall within the above principle. *Pollard v. Pleasant Hill*, 195.
23. **INSUFFICIENT DEFENSES.**—**CORPORATION DE JURE, ETC.**—To an action on negotiable bonds issued by the defendant city, it pleaded that the act incorporating it was unconstitutional: 1st, because the subject of the act was not expressed in its title; 2d, because under the constitution of Missouri, the legislature could not amend the charter of the *town* corporation by making it a *city* corporation; 3d, because Plattsburg did not, in fact, have 5,000 people when it was incorporated as a city, as required by the constitution of the state: *Held*, that neither of these objections was well taken. *Judson v. City of Plattsburg*, 181.
24. **ESTOPPEL AS TO CORPORATE CAPACITY.**—The town of Cameron was duly incorporated, but if it were not, the town having as a corporation, voted and issued the bonds, it would be estopped in favor of a *bona fide* holder thereof for value to set up that it was not incorporated. *Aller v. Town of Cameron*, 198.
25. **RAILWAY CONSOLIDATION ACT OF MISSOURI CONSTRUED.**—It seems that the Missouri railway consolidation act of March 24th, 1870 (1 Wagner's Stats. 314) does not require, as a condition of a legal consolidation, that both of the constituent companies should own roads *completed* in whole or in part—per KREKEL, J. *Washburn v. Cass County*, 251; *Harshman v. Bates County*, 150.
26. **POPULAR VOTE.—CONSOLIDATION.**—The constitution of Missouri (art. 11, sec. 14), requires a two-thirds vote to authorize municipal subscriptions to the stock of a railroad corporation: A township voted stock in company A, which afterwards, under a general law of the state, *consolidated* with company B, and formed thereby a new company C: *Held*, that a subsequent subscription by the township to company C, by virtue of the prior vote to company A, was unauthorized, and bonds which on their face recited these facts were void, even in the hands of a *bona fide* holder for value. *Harshman v. Bates County*, 150.

MUNICIPAL BONDS—Continued.

27. **ELECTION.—CONSOLIDATION.—BONDS ISSUED TO CONSOLIDATED COMPANIES.**—Railroad company A was organized for the purpose of eventually consolidating, under a law of the state authorizing it, with company B. A township, under a statute giving the power, voted to issue bonds to pay for stock in company A, and it was accordingly subscribed. Afterwards companies A and B were consolidated and the bonds before voted were issued to the consolidated company and recited a due and legal consolidation. A defense to the bonds was made on the ground that the consolidation was void; held in favor of a *bona fide* holder of bonds for value without notice of the facts which, it was insisted, rendered the consolidation illegal, that the defense was unavailing; the case being considered to fall within the principle of *Nugent v. The Supervisors*, 19 Wall. 241. *Washburn v. Cass County*, 251.
28. **RAILROAD AID BONDS.—CONSOLIDATION OF ROADS.**—The charter of the Alexandria and Bloomfield railroad company gave the county courts of the counties through which the roads should pass, power to subscribe to its stock and issue their bonds in payment of the same, *without a vote of the people*. Subsequently the company was empowered to change its name and extend its line, and its name was accordingly changed. Subsequently authority was given to this company to consolidate with an Iowa company whose road intersected it on the boundary line between the two states, and the consolidation was accordingly effected, and the consolidated company took a new name. After this consolidation, the defendant counties issued their bonds to the consolidated company by name, reciting on the face of the bonds the provision in the charter in the original Alexandria and Bloomfield railroad company as their authority to do so, and also reciting on the face of the bonds the subsequent change of name of that company, and the final consolidation and change of name. In a suit upon coupons detached from these bonds, *it is held*, on the authority of *Nugent v. The Supervisors*, 19 Wall. 241, that the authority to issue the bonds was complete, and that the defendants are liable. *Thomas v. County of Scotland*, 7.
29. **CASE DISTINGUISHED.**—The case of *Harshman v. Bates County*, United States circuit court, western district of Missouri, November term, 1873, *ante* p. 150, distinguished from the present case. *Thomas v. County of Scotland*, 7.
30. **TOWNSHIP BONDS IN MISSOURI.**—The act of the general assembly of Missouri of March 23, 1868 (Laws of 1868, p. 927, 1 Wagner's Statutes, p. 312), authorizing township aid to railways, is not in conflict with the constitution of the state. *Jordan v. Cass County*, 185.
31. **TOWNSHIP AID.—MISSOURI CONSTITUTION OF 1865.**—Article 11, section 14 of the constitution of the state, of 1865, which prohibits the legisla-

MUNICIPAL BONDS—Continued.

- ture from authorizing any "county, city, or town" to subscribe for the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not restrain the legislature from authorizing *township* aid to railways, if two-thirds of the voters of the township shall sanction the proposition. *Jordan v. Cass County*, 185.
32. *Same*.—Vote.—Whether the legislature could, in the case of townships, dispense with the popular sanction, doubted, but not decided. *Jordan v. Cass County*, 185.
33. TOWNSHIP BONDS TO BRANCH ROAD IN MISSOURI.—Bonds negotiable in form, *issued by a county in Missouri, on behalf of a township* therein, reciting that they "are issued by order of the county court made by authority of an act of the general assembly of Missouri, entitled An act to facilitate the construction of railroads in the state of Missouri, approved March 23, 1868, and authorized by a vote of more than two-thirds of the voters in said township, to aid in the construction of the Pleasant Hill & Lawrence branch of the Pacific Railroad, of Missouri," said railroad having legal power to build branches and receive such subscriptions, are valid in the hands of a holder for value without actual notice of the facts relied on to defeat a recovery on such bonds. *Jordan v. Cass County*, 245.
34. *Same*.—The proceedings of the county court in this case, considered by KREKEL, J., to be binding, even if the bonds were in the hands of the original takers thereof. *Jordan v. Cass County*, 246.
35. LIABILITY OF COUNTY ON TOWNSHIP BONDS IN MISSOURI.—As townships were not incorporated bodies, the act of March 23, 1868, above mentioned, when the proposal has been adopted by the voters of the township, authorized the *county court* to issue bonds *in the name of the county, on behalf of the township* voting the aid. *Held* (construing the legislation of Missouri): 1. That the owner of bonds thus issued by a county for or on behalf of a township had no remedy by *action* against the township, or taxable inhabitants therein. 2. That the remedy of the owner of the bonds was by *mandamus* to the county court, to compel it to levy and collect the special tax which the act provided as the means to pay the bonds and interest thereon. 3. That such an owner could *sue the county* in whose name the bonds were issued, in the federal court, and recover judgment thereon; but that such judgment could not be enforced against the county or its property, or the tax-payers of the county at large, but only by *mandamus* to the county court to compel the levy and collection of a special tax, according to the statute in such case provided. *Jordan v. Cass County*, 185.

MUNICIPAL BONDS—Continued.

36. **KANSAS LEGISLATION.**—The act of the Kansas legislature, approved March 9, 1874 (Laws 1874, p. 45, sec. 7), was intended to change the mode of levying and collecting taxes to pay municipal bonds and not to validate or make binding upon municipalities bonds which would otherwise be void. *January v. Johnson County*, 402.

MUNICIPAL CORPORATIONS. See *Municipal Bonds*.

NATIONAL BANKS.

1. **TAXATION OF SHARES.**—Under the legislation of Nebraska, shares in national banks may be taxed, and the tax enforced by distraint against the property of the bank. *First National Bank v. Douglas County*, 330.
2. **TAXATION OF CAPITAL STOCK.**—Taxation by state authority of the capital stock of a national bank, invested in United States securities, restrained. *Bank of Omaha v. Douglas County*, 298.
3. **RIGHTS TO SUE IN FEDERAL COURTS.**—National banks may, by reason of their charter as such, sue in the federal courts. *Bank of Omaha v. Douglas County*, 298.

NAVIGABLE WATERS. See *Boom*.

NEBRASKA.

Cases reported from the district of Nebraska, 298, *et seq.*

NEGLIGENCE. See *Master and Servant*.

PARENT AND CHILD.

DEATH OF CHILD BY WRONGFUL ACT OF ANOTHER.—The English and American cases as to the remedy of a father for the loss of the services of his infant child, whose death has been caused by the wrongful act of another, commented on. *Sullivan v. Union Pacific Railroad Company*, 335.

PARTIES. See *Municipal Bonds*; *Railway Mortgage*.

Suit by person beneficially interested. *Opdyke v. Pacific Railroad*, 55.

PARTNERSHIP.

Accommodation indorsement by one member of a firm. *Lemoine v. Bank of North America*, 44.

PATENTS FOR INVENTIONS.

1. **INTERFERING PATENTS.**—REV. STATS. SEC. 4918.—Section 4918 of the Revised Statutes of the United States in respect of *interfering patents*, construed, and held to vest the power in the circuit court to adjudge *either* of the interfering patents void in whole or in part,

PATENTS FOR INVENTIONS—Continued.

- and upon proper issues and proof to authorize a decree that both patents are void. *Foster v. Lindsay*, 126.
2. NEW USE.—A composition having been described in a prior patent, one who applies it to a new use cannot claim the composition as his invention. *Salamander Company v. Haven*, 131.
 3. PLEADINGS.—ANSWER.—The court cannot take notice of what was not set up in the answer against plaintiff's patent. *Salamander Company v. Haven*, 131.
 4. REISSUE.—The legal rule is that, *prima facie*, a reissue is for the same invention as that originally patented. *Salamander Company v. Haven*, 131.
 5. REISSUE.—REV. STATS. SEC. 4916.—Section 4916 of the Revised Statutes of the United States prohibits in a reissue, not only the introduction of new matter, but also the enlargement of the original claim growing out of the substantial advancement of the art. This rule controls both the patent office and the courts. *Salamander Company v. Haven*, 131.
 6. STATE OF THE ART.—Every patent as to novelty or utility, depends on the state of the art at the time of the claim made or patent issued. *Salamander Company v. Haven*, 131.
 7. NEW MATTER.—WHAT.—By new matter is not meant merely the introduction of a new ingredient in a patented composition, but any change in the original specification and claim whereby a new and substantially different composition and results are secured. *Salamander Company v. Haven*, 131.
 8. SPECIAL PATENT—VOID.—John's reissue, No. 5951, June 30, 1874, Division D, held to contain new matter, and therefore void. *Salamander Company v. Haven*, 131.

PATENTS FOR LAND. See *Taxes*.

Until a patent for land emanates, the legal title thereto remains in the United States, and it will protect any equity which the United States may have in the land from a sale for taxes by the state. *Bronson v. Kukuk*, 490; *Union Pacific Railroad Company v. McShane*, 303; *Hunnewell v. Burlington & Missouri River Railroad Company*, 313.

PAYMENT. See *Bankrupt Law*.

"PERSONAL REPRESENTATIVE."

Who is. Illinois statute construed. *Hagen v. Kean*, 124.

PLEADING AND PRACTICE. See *Various Heads*.

1. STATE PRACTICE IN FEDERAL COURTS.—Since the act of congress of June 1, 1872 (17 Statutes at Large, 197, sec. 5), the provisions of the

PLEADING AND PRACTICE—Continued.

state statutes as to pleading and practice in purely legal actions are, in the main, applicable to such actions in the circuit court of the United States. *Weed Sewing Machine Company v. Wicks*,
261.

2. **REAL PARTY IN INTEREST.**—Where the state law directs or authorizes all suits to be brought in the name of the *real party in interest*, this will, in the absence of some special statute of congress, give the like party the right to sue in actions at law in the federal courts sitting in such state. *Weed Sewing Machine Company v. Wicks*,
261.

3. **MOTIONS.—PRACTICE.—ACT OF JUNE 1, 1872.**—Under the statute law of the state of Iowa, and the practice of the state courts therein, motions are parts of the record, and rulings thereon may be reviewed on error. Section 5, of the act of June 1, 1872, makes that practice applicable in the federal court, on a writ of error to the district court, whose ruling on a motion to the jurisdiction may be reviewed. *Nazro v. Cragin*,
471.

4. **AMENDMENT.**—Leave by the trial court to the plaintiff to amend his declaration upon a forfeited recognizance given in a criminal proceeding, held not to be erroneous. *United States v. George*,
431.

POLICY OF INSURANCE. See *Insurance*.

PRESUMPTION. See *Evidence*.

PRINCIPAL AND SURETY. See *Judgment*.

PROCHEIN AMY. See *Circuit Court*.

PROMISSORY NOTES. See *Bills and Notes*.

PUBLICATION. See *Habeas Corpus*; *Libel*

Indictment must show publication in the district where it is found.
In re Buell,
116.

PUBLIC OFFICER. See *Collector of Customs*; *Criminal Law*.

PUBLIC LANDS. See *Land Grant*; *Homestead Act of Congress*.

RAILROAD. See *Burlington & Missouri River Railroad Company*; *Municipal Bonds*; *Master and Servant*; *Railway Mortgage*; *Taxes and Toll*; *ation*; *Union Pacific Railroad Company*.

1. Location of depot,
343, 359.
2. Missouri railway consolidation act of March 24 1870 (1 Wagner, Stats. 314), construed. (See *Municipal Bonds*; *Washburn v. Cass County*,
251.

RAILROAD—Continued.

3. SPECIAL LIABILITY ON GUARANTY OF BONDS.—On demurrer, held, that if the facts alleged in the petition were true, the defendant had made itself liable for the payment of interest on bonds issued by *another* railroad company, containing a representation that the defendant had, in consideration of a lease to it of the road of such company, guaranteed the payment of such interest. *Opdyke v. The Pacific Railroad*, 55.
4. DONATION OF LAND ILLEGALLY PROCURED.—The acting president and active manager of a railroad company, by an oppressive exercise of his powers, procured donations of property to be made to him in trust for the railroad company. *Held*, that his action was illegal, and that it affected the company, and that the effect was that he held the property in trust for the donors, and not the company. *Union Pacific Railroad Company v. Durant*, 343..
5. Rolling stock, nature of and mortgage thereof. See *Railway Mortgage*.

RAILWAY MORTGAGE.

1. REMEDY.—POSSESSION.—A provision in a railway mortgage, authorizing the trustee, on default of the company to pay interest, to take possession of the road, operate it and receive its income, and upon notice to sell it, is a cumulative remedy, and does not affect the right to foreclosure by bill in equity. *Alexander v. Central Railroad*, 487.
2. FORECLOSURE BY SUIT.—WHO MAY BRING.—The special provision of the deed of trust in question, held not to require a majority of the bondholders to unite in a suit to foreclose for *interest*, or request the trustee to bring such suit. *Ib.*
3. WHO MAY SUE TO FORECLOSE.—If a trustee improperly refuses to bring such suit, an individual bondholder may bring it for himself and others, and make the trustee a party defendant. *Ib.*
4. *Same.*—On a dismissal, by the plaintiff, of the bill as to the trustee, the court has a discretion to allow the trustee to file a bill for the benefit of all the bondholders. *Ib.*
5. ROLLING STOCK.—MORTGAGE.—Rolling stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly recorded as a mortgage of realty, need not be recorded also as a chattel mortgage. *Farmers, etc. Company v. St. Joseph, etc. Company*, 412.
6. *Same.*—But a different principle applies to coal, oil, and such personal property, as may be used, or is commonly used for other than railway purposes. Such property would be subject to execution, if not held by a mortgage thereof, duly executed and recorded. *Ib.*

REASONABLE DOUBT.

Defined. *United States v. McKee*, 551 ; *United States v. Babcock*, 581.

RECEIVER.

SUIT BY.—Power of a receiver to sue in the courts of another state, considered, 477.

RECOGNIZANCE. See *Bail*.

RECORDING ACT. See *Railway Mortgage*.

REGISTRY ACT. See *Railway Mortgage*.

REMOVAL OF CAUSES.

1. SUIT BY COLLECTOR AGAINST DEPUTY COLLECTOR.—An action by the collector of internal revenue against the deputy collector on his official bond, may be removed from the state court into the federal court, under the act of March 3d, 1875. *Orner v. Saunders*, 284.
2. ACT OF JULY 27, 1866.—CITIZENSHIP.—Under the act of July 27 1866 (14 Stats. at Large, 306), as to the removal of suits from a state court into the federal court, it is sufficient, *it seems*, as respects citizenship, that the defendant applying for the removal is, *at the time* of filing his petition therefor, a citizen of another state, and the plaintiff a citizen of the state in which the suit is brought. *McGinnity v. White*, 350.
3. AMOUNT IN VALUE.—It is sufficient in such a case that the matter in dispute exceeds \$500 besides costs *at the time* when the right to the removal accrues and is applied for. *McGinnity v. White*, 351, 356, *note*.
4. REMOVAL BY PART OF DEFENDANTS.—One of the several defendants sued as a *co-partner* may, if the other requisites exist, have the cause removed into the federal court, so far as concerns himself, under the act of 1866. *McGinnity v. White*, 351.
5. WHEN THE APPLICATION MUST BE MADE UNDER ACT OF 1867.—Under the act of congress of March 2, 1867 (14 Stats. at Large, 558), an action may be removed from the state court of original jurisdiction, in which it is then pending, to the circuit court of the United States, after a judgment in favor of one of the parties has been wholly reversed by the state supreme court, and a trial *de novo* ordered, if the removal is applied for before the second trial is commenced. Following *Johnson v. Monell* (1 Woolw. 390). *Kellogg v. Hughes*, 357 ; *Minnett v. Milwaukee & St. Paul Railway Company*, 460.
6. DEFENCE UNDER LAW OF THE UNITED STATES.—Under the legislation of congress, the Union Pacific Railroad Company, sued in a state court for negligence, on making application in due form,

REMOVAL OF CAUSES—Continued.

stating, *inter alia*, that it has a defence to the action arising under a law of the United States, viz., under the charter of the company, may remove the suit to the circuit court of the United States, and on such removal the cause may be fully tried on the merits. *Turton v. Union Pacific Railroad Company*, 366.

CORPORATIONS MAY REMOVE.—AFFIDAVIT.—Corporations are within the act of March 2, 1867 (14 Stats at Large, 558), in respect to the removal of causes from state to federal courts, and on a petition, and the making by the proper officer of the corporation of the required affidavit, are entitled to the benefit of the act. *Trust Company v. McQuilken*, 379; *S. P. Minnett v. Milwaukee & St. Paul Railway Company*, 460.

8. *Succ.*—The president, and perhaps the general manager of a railway company, is *prima facie* entitled to make the required affidavit in such a case. *Minnett v. Milwaukee & St. Paul Railway Company*, 460.

9. **ALIEN.—CORPORATION.**—A corporation created by the laws of Great Britain is an "alien" within the meaning of section 12 of the judiciary act of 1789 (1 Stats. at Large, 79), and when sued by a citizen of the United States in the state court, may, on complying with the requirements of that section, have the suit removed to the proper circuit court of the United States. *Terry v. Insurance Company*, 408.

10. **ACT OF 1867.—REPEAL.—RE-ENACTMENT.**—The act of March 2, 1867, as to the removal of suits from the state to the federal court, although technically repealed by the Revised Statutes, is therein substantially re-enacted, and a party on complying with its provisions is entitled to a removal of the cause. *Minnett v. Milwaukee & St. Paul Railway Company*, 461.

11. **CONDEMNATION OF PRIVATE PROPERTY.**—A suit pending in a state court, between a land-owner and an incorporated company, seeking to appropriate his private property under the right of eminent domain, where the question to be tried is the value of such land, is a suit of such a nature as may be removed to the federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company. *Patterson v. Boom Company*, 465.

REMOVAL OF OFFENDERS. See *Criminal Law; Libel*.

1. **DISTRICT OF COLUMBIA.**—For a criminal offence committed within the District of Columbia, the offender, if found beyond the district, may be removed to the district for trial. *In re Buell*, 116.
2. **POWER OF DISTRICT JUDGE.**—Where a district judge is called upon to issue his warrant for the removal of an alleged offender to the

REMOVAL OF OFFENDERS—Continued.

district where the offence was committed, he may look into the indictment, and if it is fatally defective in essential averments to constitute an offence triable in the district in which the indictment was found, he may refuse to issue such a warrant. *In re Buell*,
116.

3. *Same*.—The duty of the district judge in such cases, considered.
In re Buell, 116.

REVENUE LAWS. See *Criminal Law*; *Information in Rem*; *Internal Revenue*.

SALES. See *Bailment*; *Grain Elevators*.

Sale of six out of twenty specific municipal bonds of like character and value held good against the assignee in bankruptcy of the vendor. *Hamilton v. National Loan Bank of St. Louis*, 230.

SET-OFF. See *Bankruptcy*.

STATE COURT DECISIONS.

How far binding on federal courts. See *Municipal Bonds*; *Taxes and Taxation*.

STATUTES. See *Various Heads*.

1. Of limitation in criminal cases. *United States v. O'Brian*, 381.
2. List of acts of congress construed, *ante*, vii.
3. Construction of internal revenue acts. See *Criminal Law*; *Information*; *Internal Revenue*.
4. Title of act. See *Municipal Bonds*.

STOCKHOLDERS. See *Corporations*.

SUBPENA DUCES TECUM. See *Telegraph Company*.

1. *Form of writ* and practice of the court as to its issue. *United States v. Babcock*, 566.
2. Duty of the witness, *Ib*.

TAXES AND TAXATION. See *Mandamus*; *Municipal Bonds*; *National Banks*; *Wharfage Tax*.

1. PUBLIC PURPOSE ESSENTIAL.—Taxation can only be authorized for public as distinguished from private purposes. *Savings Association v. Topeka*, 376.
2. *Same*.—A statute which authorizes a municipality to issue bonds, that can only be paid by taxation, for the benefit of a manufacturing enterprise of private persons, is void, because it violates the fundamental rights of property, since the purpose is essentially private in its nature, although the public may be incidentally benefited. *Ib*.

TAXES AND TAXATION—Continued.

3. **BILL TO ENJOIN TAXES.—WHO JOINED AS DEFENDANTS.**—A bill by the railroad company joining as defendants the various counties through which the railroad runs, is not multifarious where the question on which the case turns is common to all, and the counties are agencies of the state as to that part of the taxes which they must pay into the state treasury. *Union Pacific Railroad Company v. McShane*, 304.
4. *Same.*—**WHAT WILL GIVE EQUITY COGNIZANCE.**—Where, in addition to the illegality of the tax, the bill shows that if not enjoined a multiplicity of suits will arise, and a cloud be cast upon the owner's title, and that he has no adequate remedy at law, it presents a case of equity cognizance. *Union Pacific Railroad Company v. McShane*, 304.
5. **ILLEGAL TAXES.—INJUNCTION.**—Where no remedy exists to recover back illegal *state* taxes when paid into the treasury, equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of *county* as well as state taxes, embraced in the same collection warrant and levy. *Bank of Omaha v. Douglas County*, 298.
6. **STATE DECISIONS.—INJUNCTION.**—On a question of restraining the collection of city taxes, upon lands within the city limits, used exclusively for agricultural purposes, this court is bound by the decision of the supreme court of the state. *Oliver v. Omaha*, 368.
7. *Same.*—A citizen of another state, in the case of an illegal tax upon his real property, levied under state authority, may proceed originally in this court, notwithstanding a provision of the state statutes requiring a previous decree in the state chancery court before any sale for taxes can be made. *Ib.*
8. **INJUNCTION.—DISTINCTION AS TO KIND OF TAXES.**—A distinction on principle and policy, suggested between enjoining local or municipal taxes, and taxes levied by the state for purposes of general revenue. *Parmley v. Railroad Companies*, 26.
9. **INJUNCTION BY FEDERAL COURT.**—A court of the United States will proceed with great caution in restraining the collection of the ordinary revenue of a state. *Parmley v. Railroad Companies*, 26.
10. **WHEN INJUNCTION GRANTED.—TERMS.**—The court laid down the following principles as those which would hereafter govern it in respect to restraining the collection of taxes, viz., that whenever a party comes into this court to enjoin the collection of taxes, or the collection of a part of a tax, if there is any part which he admits to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that he has paid it, or tendered it;

TAXES AND TAXATION—Continued.

and it is not a sufficient allegation to come and say that he is willing, or even that he has paid it into the court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, or ought to be paid, by setting up a contest over that which is doubtful, and which may, or not, be necessary to be paid. *Parmley v. Railroad Companies*, 26. [Substantially the same principle was approved by the supreme court of the United States, April, 1876, in the Illinois tax cases of *Taylor v. Secor*, *Miller v. Jessup*, and *Lieb v. Kidder*. Among other rules there laid down are the following, stated in the language of Mr. Justice MILLER, viz: 1. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection. 2. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment, if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into its treasury. 3. *Quere*: Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes, as that here applied to state taxes? Probably not. 4. No injunction, preliminary or final, can be granted to stay collection of taxes, until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, has been paid or tendered without demanding a receipt in full.]

11. **EXEMPTION.—MISSOURI PACIFIC RAILROAD.**—The specific exemption from taxation claimed by the Missouri Pacific railroad, and by the Atlantic & Pacific railroad, under section 12 of the act of December 25, 1852, is not well founded. *Parmley v. Railroad Companies*, 26.
12. **ENJOINING TAXES.—EQUITY JURISDICTION.**—The nature and extent of the jurisdiction in equity to restrain the collection of taxes, considered. *Parmley v. Railroad Companies*, 13; S. C. opinion by MILLER, Circuit Justice, 25.
13. *Same.*—Facts stated, which, if proved, would authorize a partial

TAXES AND TAXATION—Continued.

- restraint of taxes, because of the illegal action of the state board of equalization. *Parmley v. Railroad Companies*, 13.
14. *Same.*—Under the circumstances, a temporary injunction against the collection of taxes by and under state authority, was granted. *Bailey v. Atlantic & Pacific Railroad Company*, 22.
15. EXEMPTION FROM TAXATION.—Whether the exemption from taxation granted to the southwest branch of the Pacific Railroad by section 12 of the act of December 25, 1852, continues in favor of the Atlantic & Pacific railroad company, *quere?* (See *Parmley v. Railroad Company*, 26.) *Bailey v. Atlantic & Pacific Railroad Company*, 22.
16. *Same.*—There is no legislative exemption of the defendant from taxation by the state under section 12 of the act of the Missouri legislature, approved December 25, 1852. *Paul v. Missouri Pacific Railroad Company*, 25.
17. Taxability of lands of Burlington & Missouri River railroad company, 313.
18. LANDS OF UNITED STATES NOT TAXABLE.—In 1853, the plaintiff as assignee of a land warrant, located it upon a tract of land; in 1862, and before any patent had issued, the proper department cancelled the warrant and suspended the location because the warrant had been procured to be issued upon false and forged papers; the plaintiff in the latter part of 1863 substituted another warrant, and in 1863 received a patent: *Held*, that the land was not taxable for 1861, and that a tax sale and deed for the taxes of that year were void. *Bronson v. Kukuk*, 490.

TELEGRAPH COMPANY.

1. Duty to obey *subpoena duces tecum*. *United States v. Babcock*, 566.
2. Proof of receipt of message, 571, 574.

TREATY. See *Indians*.

TRUST.

Property procured by a railroad corporation, to be donated to the company, by an oppressive exercise of its powers, is held in trust for the donors. *Union Pacific Railroad Company v. Durant*, 343.

ULTRA VIRES. See *Bank*; *Municipal Bonds*.UNION PACIFIC RAILROAD COMPANY. See *Taxes and Taxation*.

1. TAXABILITY OF LANDS.—Lands for which a patent has issued to the Union Pacific railroad company are taxable by the authorities of the state of Nebraska, notwithstanding the proviso in section 3,

UNION PACIFIC RAILROAD COMPANY—Continued.

- in the act of July 1, 1862 (12 Stats. at Large 489), which subjects lands not sold or disposed of by the company, within three years from the completion of the road, to settlement and pre-emption at \$1.25 per acre. Case in judgment distinguished from the Railway Co. v. Prescott, 15 Wall. 603. Union Pacific Railroad Co. v. McShane, 303.
2. *Same*.—Said proviso construed and the respective rights of the company and persons proposing to settle on and pre-empt the lands of the company stated. Union Pacific Railroad Company v. McShane, 304.
3. REMOVAL OF SUITS.—Federal jurisdiction over the Union Pacific railroad company by removal from the state court, under the act of July 27, 1868. (15 Stats. at Large, 227.) Turton v. Union Pacific Railroad Company, 366.
4. ORIGINAL SUITS.—JURISDICTION.—Under the charter of the Union Pacific railroad company, it may sue and be sued in the circuit court of the United States for the district of Nebraska without reference to the citizenship of the adverse party. Bauman v. Union Pacific Railroad Company, 367.

WAREHOUSE RECEIPTS. See *Grain Elevators*.

WARRANT.

For removal of offenders to the district where the offense was committed. *In re Buell*, 116.

WHARFAGE TAX.

1. ORDINANCE VOID.—An ordinance of the city of St. Paul imposing a wharfage tax each trip, upon every boat and vessel landing or anchoring at or in front of the landing or wharf of the city, measured by the capacity of the boat or vessel, not to exceed twenty dollars a trip, is in conflict with the federal constitution and void. North Western Packet Company v. St. Paul, 454.
2. RIGHT TO RECOVER BACK.—A tax thereunder not paid voluntarily may be recovered back. *Id.*

WILL.—See *Indians*.

WITNESS. See *Accomplice*; *Evidence*; *Subpoena Duces Tecum*.

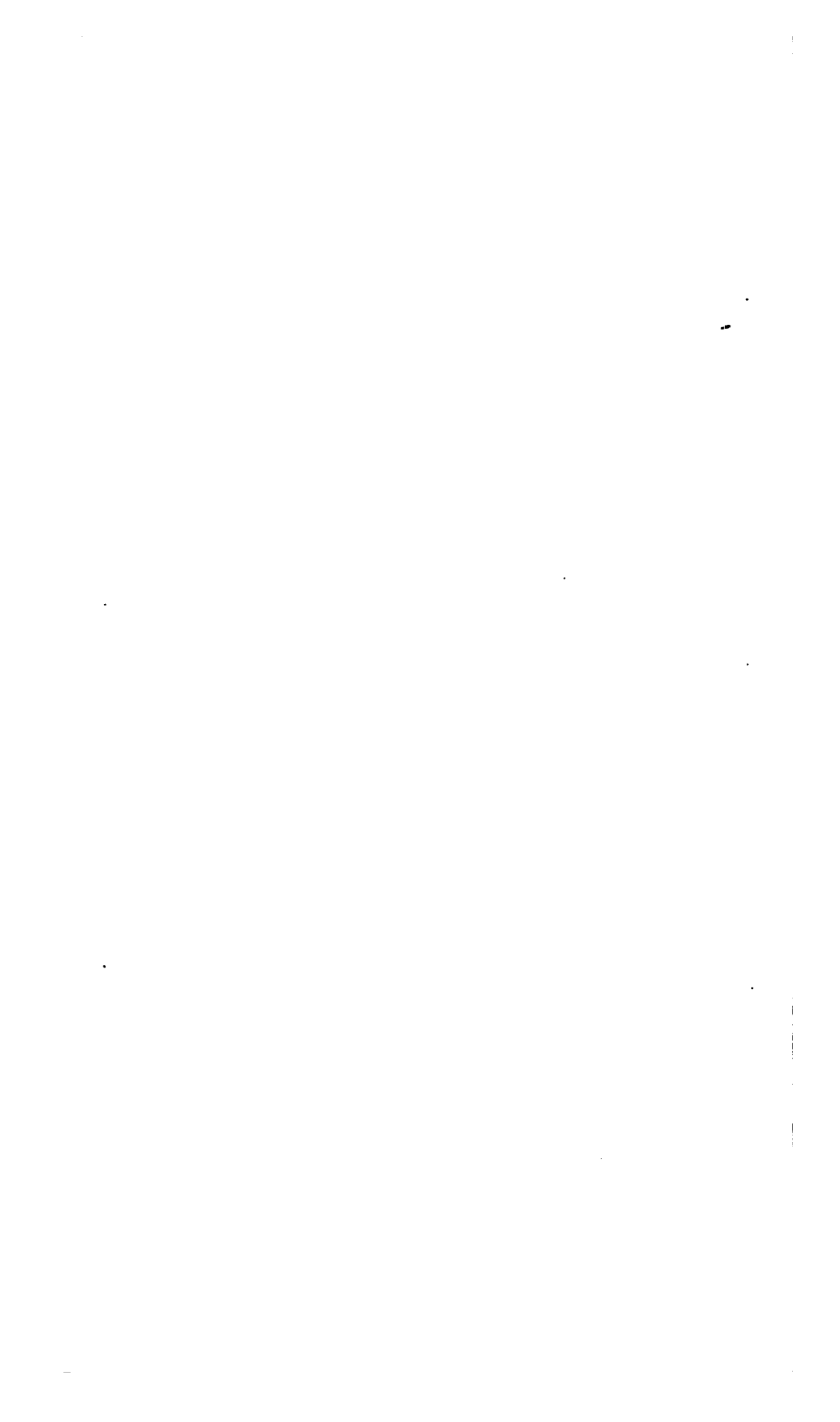
Tests of credibility. United States v. Babcock, 581.

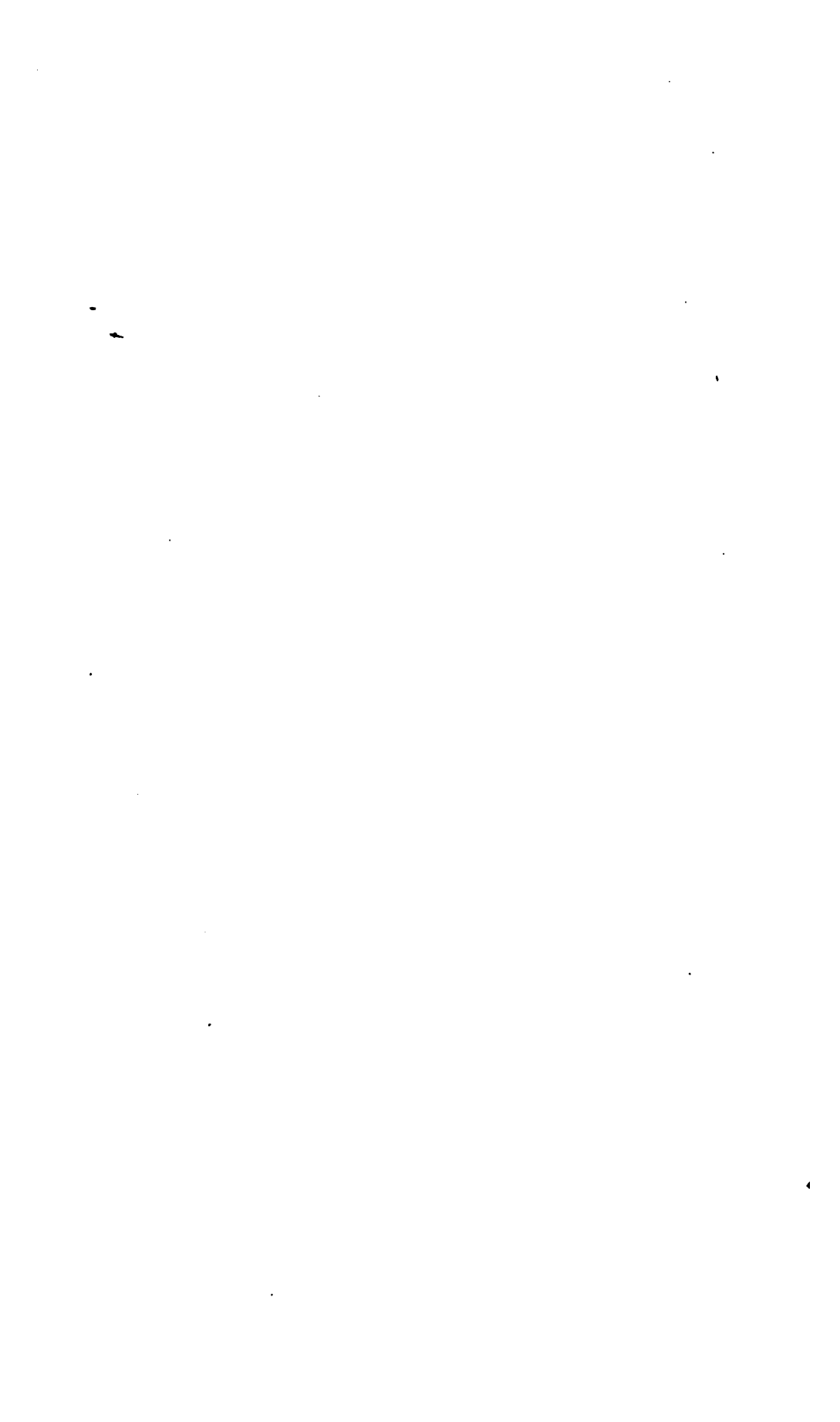
WRIT OF ERROR. See *District Court*.

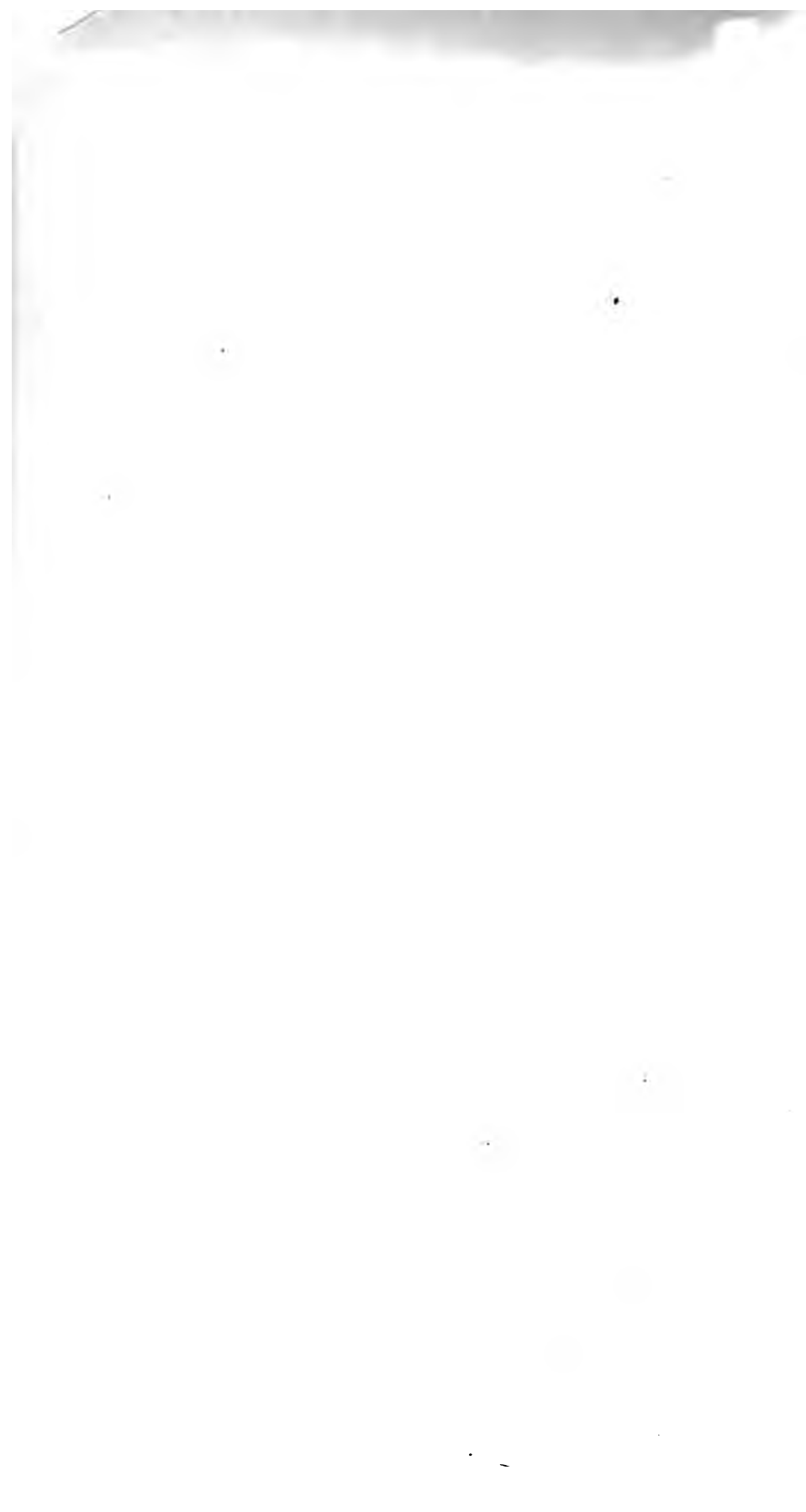
WRIT OF SUBPOENA DUCES TECUM.

Form of writ and practice. United States v. Babcock, 566.











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